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No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

RUFUS. E. CUNNINGHAM, *Petitioner,*

vs.

COUNTY OF LOS ANGELES, et al., *Respondents,*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. May attorney fees be denied a prevailing civil rights plaintiff under the Civil Rights Attorney's Fees Award Act of 1976 (amending 42 U.S.C. § 1988) because a court concludes, without any further elaboration, that the "balance of equities" disfavors such award?

2. Does the rule of *Hensley v. Eckerhart*, 461 U.S. 424 (1983), requiring district courts to provide "a concise but clear explanation of its reasons for the fee award," apply to decisions of courts of appeals completely denying fees to successful civil rights plaintiffs?

3. Is the failure to prevail against *all defendants* in an action seeking only *money damages* a "special circumstance" justifying the denial of fees incurred prosecuting successful claims?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Rufus E. Cunningham and the Respondents County of Los Angeles, Sheriff Sherman Block, Sheriff Deputies Robert Birdsall, Richard Papp, and Richard Payne; and Sergeants David Brusby and Edgar Price. The Ninth Circuit named trial counsel Richard Eiden "Real-Party-in-interest-Appellant" in its Opinion.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

RUFUS E. CUNNINGHAM, *Petitioner,*

v.

COUNTY OF LOS ANGELES, *et al., Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Rufus E. Cunningham respectfully prays that a writ of certiorari issue to review the judgment and second amended opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on June 20, 1989.

OPINIONS BELOW

The order of the United States District Court for the Central District of California is not reported. It is reprinted in the appendix hereto, A-1 through A-17, *infra.*

The Court of Appeals' original opinion is reported at 859 F.2d 705 (1988). It is reprinted in the appendix hereto, A-18 through A-34, *infra.* On March 3, 1989, the Court of Appeals amended the opinion. The March 3,

1989 Order and Amendment is reprinted in the appendix hereto, A-35 through A-37, *infra*. As amended, the opinion is reported at 869 F.2d 427 (9th Cir. 1989). The Court of Appeals amended the opinion again on June 20, 1989. The June 20, 1989 Order and Amendment is reprinted in the appendix hereto, A-38 through A-39, *infra*. As finally amended by the June 20, 1989 Order, the Court of Appeals' opinion is reported at 879 F.2d 481 (9th Cir. 1989).

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, the petitioner brought this suit in the Central District of California. On October 2, 1987, the Central District entered its order regarding the award of attorney fees to petitioner.

On petitioner's appeal, the Ninth Circuit on October 11, 1988, reversed in part and affirmed in part. After petitioner's petition for rehearing, the Ninth Circuit on March 3, 1989, filed its amended opinion. After petitioner's second petition for rehearing, the Ninth Circuit on June 20, 1989, filed its second amended opinion.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. §1988. Proceedings in Vindication of Civil Rights

. . . . In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or in any civil

action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Petitioner is a peace officer employed by the California Department of Insurance. In September, 1985, he instituted this damage action pursuant to 42 U.S.C. §1983. The complaint alleged that on September 24, 1984, defendant Los Angeles County Deputy Sheriffs arrested petitioner and searched his car in violation of his rights under the Fourth Amendment. He further alleged that he was a black man and that the Los Angeles County Sheriff's Department has a custom, policy and practice of racial discrimination against Blacks.

The seven defendants were the deputies who actually arrested petitioner, the sergeant present at the scene who approved petitioner's arrest and transportation, the sergeant at the station who approved petitioner's booking, the Sheriff of Los Angeles County, and the County itself.

The Sheriff's and County's unopposed motion for summary judgment was granted. Before trial, the District Court dismissed the complaint against the sergeant who approved the booking and one deputy who, although present at the scene of the arrest and the author of the arrest report, did not directly participate in petitioner's arrest.

After the presentation of all evidence against the three remaining defendants but before the case was submitted to the jury, the remaining defendants agreed to settle.[1] The settlement provided that petitioner was the prevailing party.

Petitioner filed his motion for attorney fees pursuant to 42 U.S.C. § 1988, supported by declaration and contemporaneous time records showing attorney fees incurred of approximately $28,000.[2] The District Court acknowledged that petitioner's counsel had "put in the time,"[3] and that the hourly rate was reasonable. (Court of Appeal Opinion, Appendix, A-21.) The time records disclosed that all but a small portion--less than ten percent--of the expended time was spent pursuing the case

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[1] As it now stands, the total award to petitioner is more than ten times the amount offered by defendants in settlement five days before trial. Excerpt of Record, page 30, lines 16-21; page 95. It is also considerably more than petitioner's initial settlement demand. Excerpt of Record, page 67, lines 23-25; page 92.

[2] Appellant claimed $27,120 for work on the merits. ($27,120.00 is obtained by multiplying the total hours claimed [Excerpt of Record, 86:10-15] by the hourly rates [$135.00 per hour for attorney time and $35.00 per hour for clerk time]. The $26,120 figure used by the District Court [Appendix, A-3] appears to be a typographical error.) The original fee application also claimed 5.75 hours for work on the fee application alone. (Excerpt of Record, page 91.) $135.00 per hour (the fee rate used by the district court [Appendix, A-8] times 5.75 hours equals $776.25. Adding $27,120.00 to $776.25 equals $27,896.25. (The district court awarded no fees for most of the $3,037.50 noted at Appendix A-3, for most of it was time spent opposing the imposition of Rule 11 sanctions (Appendix A-10). For further analysis of the arithmetic, see Petitioner's Reply Brief filed before the Ninth Circuit, pp. 4-6.

[3] Excerpt of Record, page 31, line 5.

against the defendants who eventually settled.[4] The District Court fixed the lodestar figure at 3/7th of $28,000, $12,000. Then the district court cut the lodestar by $4,500, leaving a fee of $7,500. Then the district court imposed Rule 11 sanctions of $5,000, later reduced to $4,719, leaving a total to petitioner of about $2,500.

The Ninth Circuit Court of Appeals held that the imposition of sanction was improper, and that the cut of the fee from the "lodestar" amount of $12,000 to $7,500 was improper. However, it upheld the cut from the requested amount, $28,000, to $12,000. The court stated: "But far from an arbitrary slashing of the lodestar amount by the percentage of defendants dismissed, the court analyzed the importance of each defendant to Cunningham's overall case."[5] (Appendix, A-25.)

The Ninth Circuit, while recognizing that "1988 fees are ordinarily available to compensate attorneys for successful litigation of their fee applications, including work on appeal," denied petitioner both fees and costs on appeal. (Appendix, A-39.)

Initially, this denial was without any explanation whatsoever. (Court of Appeal Opinion, Appendix A-34; *see also* 859 F.2d at 714.) After Petitioner's first petition

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[4] Excerpt of Record pages 192-195.

[5] As can be seen from the District Court Order, this claim is inaccurate. There is nothing in the District Court Order suggesting that it thought that the dismissed defendants were important to petitioner's case. The fees were reduced by 4/7ths. The District Court justified the reduction by saying, "As there were seven defendants named in the complaint and only three remaining at trial, it is clear that a substantial amount of effort was directed to defendants against whom no recovery was obtained." Appendix, A-10.

for rehearing, the court wrote that fees were denied on appeal because trial counsel "tested the boundaries of ethical conduct" in that he "made no effort to prove his case against the dismissed defendants."[6] (March 3, 1989 Order Amending Opinion, Appendix A-37; *see also* 869 F.2d at 436-37.) Upon petitioner's second petition for rehearing, the Court of Appeals deleted the reference to unethical conduct and left, as the only reason for the denial of fees, the "balance of equities," without any explanation at all of what that means. (Second Order Amending Opinion, Appendix, A-39; *see also* 879 F.2d at 491.)

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[6] The Ninth Circuit correctly abandoned the perplexing view that dropping a claim the litigant believes to be unnecessary to the ultimate relief obtained is somehow "unethical." It is contrary to sound public policy and judicial economy to require a litigant to pursue every claim to the bitter end even when, after reflection and discovery, it appears that the prosecution of the claim will result in an undue consumption of time. It is unfortunate that this charge found its way, without notice or an opportunity to be heard, into a published (albeit withdrawn) opinion.

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit's "balance of equities" doctrine for denying fees to prevailing civil rights plaintiffs (a) conflicts with the rule that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust" and (b) is so vague as to be meaningless, promote uncertainty, and work injustice.

Prevailing civil rights plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); *see also Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983); *Northcross v. Board of Education of Memphis*, 412 U.S. 427, 428 (1973).

Virtually all alleged "special circumstances" asserted before this Court have been rejected. For example, fee awards to counsel for prevailing plaintiffs are proper even though: plaintiffs are state-funded entities, *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 487 n.31 (1982); plaintiffs were represented for free by a public interest organization, *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 70-71 n.9 (1980); defendants acted in good faith, *Hutto v. Finney*, 437 U.S. 678, 693 (1978); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-02 (1968); the applicable fee shifting statute became effective after most of the litigation had occurred, *Hutto v. Finney*, 437 U.S. 678, 694 n.23 (1978); *Bradley v. Sch. Bd. of City of*

Richmond, 416 U.S. 696, 710-22 (1974).

Courts of Appeals have, in turn, rarely found special circumstances which would render an award of fees to plaintiffs unjust and have held virtually every alleged special circumstance to be irrelevant. For example, in *Lenard v. Argento*, 699 F.2d 874 (7th Cir. 1983), the Seventh Circuit rejected as special circumstances that plaintiff recovered a large damage award, that defendants had no substantial resources of their own, and that there was a one-third contingency fee agreement. In *Smiddy v. Varney*, 665 F.2d 261 (9th Cir. 1981) *cert. denied*, 459 U.S. 829 (1982), the Ninth Circuit rejected as irrelevant that plaintiffs proceeded on their own rather than through a class action, that plaintiffs recovered substantial damages, and that there was a private contingency fee agreement. In *Ellwest Stereo Theater, Inc. v. Jackson*, 653 F.2d 954 (5th Cir. 1981), the Fifth Circuit rejected as special circumstances the defendants' good faith in enacting the challenged ordinance, defendants' good faith in not appealing the federal court order enjoining the ordinance, and the fact that plaintiffs were financially able to pay their own fees.

Other courts have held numerous other circumstances to be irrelevant to plaintiffs' entitlement to fees. *See, e.g., Hall v. Hall*, 738 F.2d 718 (6th Cir. 1984) (plaintiff was disrespectful when excessive police force was used against him); *El Club Del Barrio v. United Community Corporation*, 735 F.2d 98 (3rd Cir. 1984) (silence in a consent decree as to fee entitlement); *McCann v. Coughlin*, 698 F.2d 112 (2d Cir. 1983) (plaintiff won no injunctive relief and no monetary relief other than $1 in nominal

damages);[7] *Sanchez v. Schwartz*, 688 F.2d 503 (7th Cir. 1982) (plaintiff's bright prospects of recovering substantial damages); *Bonnes v. Long*, 651 F.2d 214 (4th Cir. 1981) (allegedly provocative statements by plaintiffs and their counsel), *cert. denied*, 455 U.S. 961 (1982). Nor does the fact that the case may have been "close" on the question of the sufficiency of the evidence justify a denial of fees. As one court noted in this connection, only "close" cases generally go to trial; the others usually settle. *Robinson v. Moreland*, 655 F.2d 887 (8th Cir. 1981).[8]

The "balance of equities" doctrine espoused by the Ninth Circuit is a wide open door through which any claim of "special circumstances" could pass with ease. Yet, this Court has repeatedly held that the discretion to deny fees is exceedingly "narrow." *New York Gaslight Club, Inc. v. Carey*, *supra*, at 68 (1980); *Newman v. Piggie Park Enterprises*, *supra*, at 402-03 (1968); *Washington v. Seattle Sch. Dist.*, *supra*, at 487 n.31. The "balance of equities" standard is not "narrow" at all. It has virtually no meaning. Between whom or what is the balance? What did it mean in this case? How are trial courts to interpret its meaning? What guidance does it provide future litigants?

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[7] According to the District Court, the damages petitioner suffered as a result of the violation were "not a lot." (Additional Excerpt of Record, page 230, line 22.)

[8] It bears noting that the District Court opined, before trial, that petitioner's probability of success was "awful." (Excerpt of Record, page 031, line 13.) After trial, the District Court believed that petitioner's "constitutional rights were infringed." (Additional Excerpt of Record, page 230, line 5.) Also, the District Court said, "It's alarming how many legal constitutional concerns that incident raises." (Additional Excerpt of Record, page 234, line 25 et seq.)

Basically, the *Cunningham* opinion approved the clearly incorrect view of the Central District of California that "'special circumstance' [is] a very broad term." (District Court Order, Appendix, A-3, note 1.)

II.

There Exists A Conflict Within The Ninth Circuit Regarding What Constitutes "Special Circumstances" Which This Court Should Resolve.

Another panel of the Ninth Circuit recently recognized, with considerable reluctance and only after initially denying fees altogether, that "'a denial of fees on the basis of "special circumstances" is extremely rare.'" *Borunda v. Richmond*, ____ F.2d ____ (9th Cir. 1989), 89 Daily Journal D.A.R. 11494 (September 12, 1989). According to *Borunda*, the only basis for not awarding fees to a successful civil rights plaintiff on appeal is because "counsel failed to adequately brief the issues." Since such is not the case here, there is a conflict within the Ninth Circuit.

III.

Courts of appeals should be required, just as are district courts, to provide a "concise but clear explanation" of the basis for denying fees to a prevailing civil rights plaintiff.

In *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), the Court held that a *district court* should "provide a concise but clear explanation of its reasons for the fee award."

This mandate has been uniformly applied by lower courts: "Conclusory statements" concerning reasonableness are insufficient, *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945 (1st Cir. 1984); the court must "articulate its reasons," *Mammano v. Pitiston Company*, 792 F.2d 1242, 1246 (4th Cir. 1986); the court must state the "basis" for its "conclusion," *Southerland, v. International Longshoremens' Local 8,* 845 F.2d 796, 801 (9th Cir. 1987); fees may not be denied to a successful civil right plaintiff "without specifically stated grounds for denial," *Unemployed Workers Organizing Committee v. Batterton*, 477 F. Supp. 509 (D. Maryland 1979).

Clearly, the conclusory statement that the "balance of equities" disfavors the award of attorney fees would not pass muster under *Hensley v. Eckerhart*. Neither this Court, nor any other court, nor any iitigant could possibly fathom what the factual basis for this conclusory allegation is.

There are compelling reasons to require courts of appeal as well as district courts to provide clear, factual explanations for the denial of fees to successful civil rights plaintiffs. Fairness to litigants, consistency of decision and effectiveness of review all require it. The Ninth Circuit's "balance of equities" approach informs neither the present nor any future litigants when fees will be awarded and when not. Without some factual explanation, it is impossible to know whether the Ninth Circuit's view of the "balance of equities"[9] is even remotely similar to that

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[9] In *Unemployed Workers Organizing Committee v. Batterson*, 477 F. Supp. 509, 513, the District Court observed that "the Act does not approve an equitable theory for awarding attorneys fees; rather it provides a statutory basis for their award, largely as an incentive to

of other courts. Without something more than a bald conclusory statement that the "balance of equities" disfavors the award of fees, this Court will find it difficult to determine whether lower courts are following the law requiring the award of attorney fees except in narrowly defined special circumstances.

IV.

In an action seeking only money damages, a civil rights plaintiff's failure to prevail against all defendants does not justify a refusal to pay fees for work expended on prevailing claims.

The Ninth Circuit's determination that the district court properly set the lodestar at $12,000 is a dangerous departure from well-established law. It is an invitation to lower courts to base fee awards on completely inappropriate factors. It is likely to engender more fee litigation, further taxing the limited resources of the federal judiciary.

The Ninth Circuit decision is premised upon the correct proposition that in setting a proper fee the court must take into consideration "the significance of the overall relief obtained" to a plaintiff's claims and remedies pursued in the litigation. (*Hensley*, *supra*, 461 U.S. at 435.) Court of Appeal Opinion, Appendix, A-25. However, use of this principle to slash fees in cases seeking only money damages from multiple defendants on the ground that some of the defendants who escape liability are, for unknown, unstated, and non-existent reasons, somehow

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plaintiff litigation under the civil rights laws."

"important" to a plaintiff's case, is a subversion of the intent of Congress, as recognized by this Court.

In a damage action, a particular defendant might be important if that defendant is the only one with sufficient assets to pay an award. That is hardly the problem here. In California, pursuant to California Government Code §815.2, the employing public entity, in this case the County of Los Angeles, must indemnify its employees for liability based on compensatory damages. The County of Los Angeles, although its summary judgment motion was granted, funded the settlement here. Even if California Government Code § 815.2 did not exist, it is highly unlikely that the three defendants against whom petitioner prevailed would not be able to satisfy his judgment. Certainly, there is no evidence in this record that they could not. Under these circumstances, to speak of particular defendants as being "important to plaintiff's overall case" is plainly without justification.

This issue is important because it arises in numerous civil rights cases. It is essential that a civil rights plaintiff name the correct police officer as a defendant. Liability is not automatically imputed to the public entity. *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Frequently, a trial is required to determine which of many potential defendants is responsible. For example, In *City of Riverside v. Rivera*, 477 U.S. 561 (1986), the trial court dismissed plaintiffs' claims against twenty-seven of thirty-two defendants. Yet this Court quoted with approval the statement of the district court, "'it would, in my opinion, have been wrong for you not to join all those officers since you yourself did not know precisely who were the officers that were responsible.'" *Id.* at 570-71.

If a district court or court of appeals is free to arbitrarily and for unexplained reasons slash fees by merely claiming, without any evidence or reasoning whatsoever, that certain defendants are somehow "important" to a plaintiff's "overall case," then the bench and bar are awash in a sea of standardless uncertainty. The painstaking efforts of this Court to erect a rational framework for effectuating the will of Congress, as expressed in the Civil Rights Attorney's Fee Act of 1976, and to promote fair and reasonable attorney fee awards, will be undermined.

Moreover, as this Court wisely held in *Texas State Teachers Ass'n v. Garland Independent Sch. Dist.*, ___ U.S. ___, 109 S.Ct. 1486 (1989), "By focusing on the subjective importance of an issue to the litigants, it asks a question which is almost impossible to answer. . . . This question, the answer to which appears to depend largely on the mental state of the parties, is wholly irrelevant to the purposes behind the fee shifting provisions, and promises to mire district courts entertaining fee application in a inquiry which one commentator has described as 'excruciating.'" (109 S.Ct. at 1492-93.)

CONCLUSION

For these various reasons, the petition for certiorari should be granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RUFUS E. CUNNINGHAM,

Plaintiff,

vs.

COUNTY OF LOS ANGELES, SHERMAN BLOCK, Sheriff of Los Angeles County, ROBERT BIRDSALL, RICHARD PAYNE, SGT. BRUSBY, SGT E.R. PRICE, and RICHARD PAPP,

Defendants.

FILED
OCT - 2 1987
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

ORDER

FACTUAL AND PROCEDURAL BACKGROUND

The defendants, deputy sheriffs Payne, Papp, and Birdsall, asserted that when they arrested Rufus Cunningham on September 24, 1984, they had probable cause. They claim that they had responded to a radio call that a fight was occurring at Santa Fe Springs Park and that some of the fight participants had guns. When they arrived at the park, the defendants say that some people leaving the park told them that two black men had guns. A second group of people allegedly told them that they had seen one of the black men put a gun in his car under the front seat.

The deputies then found two black men at the park. They were with a group of ten to twenty whites. As they approached, they say they saw one of the black men (not the plaintiff) drop a metallic object in a trash can. The deputies recovered this object, which turned out to be a loaded gun. The deputies then say that Cunningham turned abusive and incited the crowd to become hostile. The deputies, fearing for their safety, handcuffed Cunningham and put him in the patrol car. They then searched his car and discovered his gun.

Prior to being handcuffed, plaintiff identified himself as a peace officer and displayed a badge issued by the California Insurance Commissioner; however, it did not indicate whether plaintiff was authorized to carry a concealed weapon. The deputies then transported plaintiff to a sheriff's station in order to further investigate his status as a peace officer and because of the unruliness of the crowd. He was released about an hour later.

Cunningham tells a different story. He argues that he was at a company picnic when five sheriff cars approached his group. He says that he and the manager of the group approached the sheriffs with their hands up. Cunningham was then immediately patted down and left in that position for an extended period. He identified himself as a peace officer and produced his badge. The deputies did not examine the badge. He was handcuffed and placed in the patrol car when he asked for a second time whether he was free to go. Cunningham believes that the arrest was without probable cause and was the result of racial bias.

This § 1983 case was settled on May 27, 1987 - after evidence was presented to the jury, but before jury deliberations. Cunningham charged the named defendants

- five L.A. County deputy sheriffs, Sherman Block (Sheriff of L.A. County), and L.A. County - with unconstitutional search and seizure and arrest without probable cause. The parties settled on $5,000.00, the agreement explicitly allowing plaintiff's counsel to seek fees and costs pursuant to 42 U.S.C. 1988 as the prevailing party. Plaintiff now seeks his attorney's fees: $26,120.00 for work on the merits, and $3,037.50 for work on attorney's fees motions and a motion regarding why sanctions should not be imposed on him.

In the court's view, the evidence at trial reflected a reasonable judgment call on the part of the officers especially in light of the information they received upon entering the park. While they might have more thoroughly checked out Cunningham's story in the park before questioning him briefly at the Sheriff's station, the pressure of the unruly crowd influenced their decision. In any event, even examining the evidence in the light most favorable to the plaintiff, the case was marginal, even against the settling defendants.

DISCUSSION

INTRODUCTION: The Kerr Guidelines

District courts are authorized by 42 U.S.C. § 1988 to award a reasonable attorney's fee to prevailing parties in civil rights litigation.[1] As asserted in Maher v. Gagne, 448

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[1] A party victorious on a Civil Rights statutes is entitled to recover an attorney's fee "unless special circumstances would render an award unjust." Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412, 417 (1978). However, the Supreme Court's explicit approval of the test comprised of the twelve Johnson/Kerr factors leaves "special circumstances" a very broad term. As stated in Hensley v.

U.S. 122 (1980), the fact that a civil rights complainant prevailed through settlement rather than through litigation does not preclude her from claiming attorney's fees as a "prevailing attorney" within the meaning of 42 U.S.C. 1988. Cf. Brewer v. American Battle Monuments Comm'n, 814 F.2d 1564 (Fed. Cir. 1987).

As stated in Hensley v. Eckerhart, however, "the product of reasonable hours times a reasonable rate does not end the inquiry." 461 U.S. at 434, as quoted in City of Riverside v. Rivera, 473 U.S. 1315, 1320 (1985). The Ninth Circuit has adapted from the Fifth Circuit precedent of Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), a list of factors a district court should consider when awarding attorney's fees. See, e.g., General Signal Corp. v. Donallco, Inc., 787 F.2d 1376 (9th Cir. 1986); S.E.C. v. Randolph, 736 F.2d 525 (9th Cir. 1984).

These twelve guidelines as defined in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1975), were derived directly from American Bar Association Code of Professional Responsibility Rule 2-106 (1980). The Johnson/Kerr factors have been cited with approval by the Senate Report on the Civil Rights Attorney's Fees Award Act of 1976, S. REP. NO. 94-1011, 1976 U.S.CODE CONG. & ADMIN. NEWS 5908, 5913, and by Hensley v. Eckerhart. Importantly, it is not necessary for the district court to consider each of Kerr's twelve factors, to weigh equally the factors it does consider, or for the court

Eckerhart, 461 U.S. 424, 430, (1983), "[T]he amount of the fee, of course, must be determined on the facts of each case."

to be rigid in its application of the guidelines.[2]

According to Kerr, an award of attorney's fees should be computed according to the following guidelines: (1) the time and labor involved; (2) the novelty and difficulty of the questions involved;[3] (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent;[4] (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; (12) awards in similar cases. Kerr, 526 F.2d at 70.

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[2] In Martinez v. Idaho First National Bank, 755 F.2d 1376 (9th Cir. 1985), the court ruled that a district court that specifically mentions only three of the Kerr factors in its decision has not abused its discretion. Toombs v. Leone, 777 F.2d 465, 472 (9th Cir. 1985), further found, "[t]hat the court did not proceed ritualistically through Kerr twelve factors is not fatal to its imposition of a sanction of attorney's fees." See Rothfarb v. Hambrecht, 641 F.Supp. 71, 73 (N.D.Cal. 1986); Moore v. Jas. H. Matthews & Co., 682 F.2d 830, 838 (9th Cir. 1982).

See also Copeland v. Marshall, 641 F.2d 880, 890 (D.C. Cir. 1980)(en banc)(factors redundant and imprecise and thus not rigidly applied).

[3] Novelty does not seem to be an active "consideration" in the Ninth Circuit. The U.S. Supreme Court decision in Blum v. Stenson, 465 U.S. 886, 898 (1984) concluded that the novelty and complexity of a lawsuit may not be used to enhance a fee, and the Ninth Circuit ruling in Teitelbaum v. Sorenson, 648 F.2d 1248 (9th Cir. 1981) found, for policy reasons, that novelty cannot be used to reduce an attorney's fee award.

[4] In this regard, Eiden admitted that he was advanced $4,000 in fees and costs by his client. Under their arrangement, it appears that counsel will not have to return that fee (See Plaintiff's Proposed Findings of Fact, par. 127).

It should be noted that several of these factors cannot serve as an independent bases for adjusting the fee award.[5] The Supreme Court has indicated that these factors are already factored into either the amount of billable hours or the hourly rate charged. Blum v. Stenson, 465 U.S. at 898-99. Thus, reference to these factors will not allow a district court to enlarge or lower the amount obtained pursuant to the lodestar approach. See Miller v. Los Angeles County Board of Education and Stuart E. Gothold, 87 D.A.R. 6076, 6078 n.4, citing to Blum v. Stenson, 466 U.S. at 898-900, and Jordan v. Multnomah, 815 F.2d 1258, 1262 n.6 (9th Cir. 1987).

Computation: Determining a Lodestar Amount

Computing an attorney's fee award via the Kerr factors is subjective and with many overlapping and redundant concerns. See Generally M. Derfner & A. Wolf, Methods of Fee Calculation, 2 Court Awarded Attorney Fees (1986). The Supreme Court has thus indicated that a fee amount might be more judiciously reached if an objective computation is established as a foundation before the Kerr factors are applied. Blum v. Stenson, 465 U.S. 886; Hensley v. Eckerhart, 461 U.S. 424, (1983). The objective "lodestar," computed by multiplying a reasonable rate with the reasonable hours expended, would then be adjusted, up or down, to account for factors (i.e., the Kerr factors) that made the individual case atypical.

"Reasonable attorney's fees" under § 1988 are to be calculated "according to the prevailing market rates in the

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[5] Those factors that cannot serve as an independent bases are: 1) the novelty and complexity of the issues, 2) the special skill and experience of counsel, 3) the quality of representation, 4) the results obtained. See Blum v. Stenson, 465 U.S. 886, 898-899 (1984).

relevant community." Blum v. Stetson, 465 U.S. at 895. As set forth in Keith v. Volpe, 501 F. Supp. 403, 413-14 (C.D. Cal. 1980), attorney's fees may also include work done by law clerks - if, of course, the expenses are reasonable and the rates charged to the clerks are commensurate with their legal skills.

In order to determine if the time expended on a case was reasonable, a court must dissect the claims and the methods by which they were pursued. To accomplish that, the court must look at the plaintiff's degree of success.[6] If a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, non-frivolous, and raised in good faith. Hensley v. Eckerhart, 461 U.S. at 436. According to Hensley, the lower courts must consider "the relationship between the amount of the fee awarded and the results obtained," and reduce the fee request if "the relief, however significant, is limited in comparison to the scope of the litigation as a whole."[7]

This is not to say that a plaintiff has to win on all claims and against all defendants to collect an attorney's

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[6] See Blum, 465 U.S. 886; Hensley, 461 U.S. 424. The Hensley Court asserted that the fee petitioner's degree of success was, aside from time and rate, "the most critical factor" in determining the amount of a fee. 461 U.S. at 436.

[7] Id. at 439, 440. Some courts have extrapolated from the Hensley language that the relief obtained must justify the expenditure of the time claimed. In Toombs v. Leone, 777 F.2d at 472, for example, the Ninth Circuit upheld the district court finding that the plaintiff was entitled to forty percent of his costs because only "40% of the time would necessarily have to be repeated in preparation again for the trial." See, e.g., Tusa v. Omaha Auto Auction Inc., 712 F.2d 1248 (8th Cir. 1983).

fee award.[8] However, forcing a defendant to pay an attorney for work spent on a frivolous or otherwise unsuccessful claim would defeat the reasoning behind 42 U.S.C. § 1988. To award a plaintiff's attorney a sum that covers work not related to the plaintiff's success(es) would be to skirt the requirement that there be "success" for there to be an attorney's fee award, and would further serve to encourage empty claims rather than protecting the rights of true civil rights plaintiffs.

The Facts As Applied:

The Lodestar Amount

We do not contest Eiden's assertion that $135.00 per hour is a reasonable rate for an attorney of his skill and experience and in his field of practice, nor do we challenge the hourly rate assigned to his clerks. Whether the time spent was "reasonable," however, is suspect. The original defendants in this case were the County of Los Angeles, Sherman Block (Sheriff of Los Angeles County), Officers Richard Payne, Richard Papp, and Robert Birdsall, and Police Sergeants Brusby and E.R. Price. On May 21, 1987 - twenty months after the complaint had been filed - Sherman Block and the County of Los Angeles were dismissed from the action. The court granted the motion because the plaintiff failed to file any written opposition to

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[8] Suzuki v. Yuen, 678 F.2d 762 (9th Cir. 1982); Sethy v. Alameda County Water Dist., 602 F.2d 894, (9th Cir. 1979), Cert. denied, 444 U.S. 1046 (1980). Sethy explains, however: "the mere fact that Sethy was not victorious as to all defendants does not automatically bar an attorney's fees award...However, the amount of attorney's fees they receive should be based on the work performed on the issues in which they were successful." Sethy, 602 F.2d at 897-98 citing Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978).

the defendants' summary judgment motion. At the commencement of the trial, Eiden dismissed Officers Brusby and Payne (See Findings of Fact, paragraphs 4 and 5).

The instant motion for attorney's fees bears some resemblance to the fact pattern in Greater Los Angeles Council on Deafness v. Community Television of Southern California, 813 F.2d 217 (9th Cir. 1987). The formula in that case was reached by "comparing the significance of the overall relief obtained to all the claims and remedies pursued in the litigation." Greater Los Angeles Council on Deafness, 813 F.2d at 222. The court in Greater Los Angeles Council on Deafness reached the proportion of attorney's fees it thought the plaintiff deserved as follows:

> [Plaintiff] filed suit against several government defendants, as well as private defendants. The private defendants were dismissed after the trial. Plaintiffs ultimately succeeded only on part of their claim against the Department of Education...We hold that plaintiffs' limited success entitles them to 40% of the total lodestar amount...

Plaintiff's claims against Los Angeles County and Sherman Block were dismissed without opposition, and accordingly, must be categorized as unsuccessful. Eiden's aforesaid concessions and dismissal regarding defendants Brusby and Payne could likewise render those claims unsuccessful. Plaintiff's documentation regarding the breakdown of time spent on the case does not distinguish between the work efforts done against the respective defendants. As there were seven defendants named in the complaint and only three remaining at trial, it is clear that a substantial amount of effort was directed to defendants

against whom no recovery was obtained.

The court appreciates the fact that a plaintiff does not necessarily have to be victorious as to all defendants to collect an attorney's fees award.[9] However, as stated in Hensley, "where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." 461 U.S. at 440. The court therefore concludes that even if we accept the lodestar amount, it must be reduced substantially. Further, Eiden's work involving the sanctions threatened against him by the court similarly does not reflect a civil rights claim successfully pursued. The attorney's fees charged for the twenty-two hours that Eiden worked on the Rule 11 must further reduce the fee. Accordingly, we have reduced the lodestar figure including work on the merits and on the post-settlement motions to $12,000. In discussing the lodestar computations and adjustments, we emphasize that it was only one factor in our overall analysis in reaching an appropriate fee.

The Kerr Factors

The court will now apply the Kerr factors, listed infra. While time and labor spent on the case was substantial, plaintiff failed to submit documentation of dates and activities with regard to the work done by law clerks Brigitte Lopez, Alicia Fuchs and Elena Popp. Further, the court has not received declarations from the above-named clerks concerning their work on this case. According to Eiden, their combined work hours on this case totalled 290 hours, accounting for well over two-thirds of the work effort for which plaintiff now seeks fees.

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[9] See supra note 6.

The Supreme Court asserted in Hensley v. Eckerhart, "[W]here the documentation is inadequate, the district court may reduce the award accordingly. Hensley v. Eckerhart, 461 U.S. at 433. Chalmers v. City of Los Angeles, a Ninth Circuit decision, added: "[I]n determining reasonable hours, counsel bears the burden of submitting detailed time records justifying the hours claimed to have been expended...Those hours may be reduced by the court where documentation of the hours is inadequate..." Chalmers v. City of Los Angeles, 796 F.2d 1205, 1210 (9th Cir. 1986). This court is unable to derive from the absence of documentation of the clerks' work a number or factor by which the final sum should be reduced, but will take into consideration when determining a final attorney's fee award plaintiff's negligence in this regard.

Several other Kerr factors are worthy of discussing. Our observations of Eiden's performance, both pre-trial and at trial reveal a mediocre effort at best. Neither his pleadings, or trial performance exhibited the skill and preparation one would expect from someone with his experience.

One other consideration that merits more careful scrutiny and application is the Kerr factor dealing with "the amount involved and results obtained." Importantly, application of this factor should not be confused with the earlier determination of reasonable rate times reasonable time expended. Simply stated, the analysis used to determine the lodestar figure centers on the question of whether the time was reasonably spent, arriving at a figure by examining in part the claims asserted and whether they

were successful.[10] In contrast, the Kerr factor considers the final award relative only to the "amount involved."[11] Plaintiff Rufus E. Cunningham stated in his complaint that he had been damaged in the sum of $20,000.00, further requesting exemplary and punitive damages in the amount of $500,000.00. Fifteen months after that date, the parties settled for $5,000.00.

The Ninth Circuit approved, in Greater Los Angeles Council on Deafness, of a direct comparison between the award sought and that obtained as a factor in determining the attorney's fee award.[12] Greater Los Angeles Council

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[10] As discussed previously, courts have seen fit to use percentage cuts on the lodestar amount in response to the problem of frivolous, duplicative or otherwise excessive hours. Fioretti and Convery, Attorney Fees: The Mushrooming Cloud of Litigation, 34 DE PAUL L. REV. 943, 963 (1985), reprinted in Illinois Institute for Continuing Legal Education, 1 § 1983 Civil Rights Liability and Practice Institute 5-113 (1986).

See e.g. Institutionalized Juveniles v. Secretary of Pub. Welfare, 758 F.2d 897 (3rd Cir. 1985)(50% cut); New York State Ass'n for Retarded Children v. Carey, 711 F.2d 1136, 1146 (2nd Cir. 1983)(5% to 20% cuts); Akron Center for Reproductive Health v. City of Akron, 604 F. Supp. (N.D. Ohio 1985)(20% cut).

[11] The supreme Court has repeatedly asserted that a requested attorney's fee may be reduced twice - for unsuccessful claims, and again if the final award reflects only partial success. See Blum v. Stenson, 465 U.S. 886; Hensley v. Eckerhart, 461 U.S. 424.

[12] Justice Rehnquist thinks that a comparison between the total award obtained and the attorney's fees requested should also be relevant in determining an attorney's fee award. While this suggesting is not controlling precedent, and has even seen disapproval in the Ninth Circuit (See City of Riverside v. Rivera, 473 U.S. at 1320), Rehnquist asserted the following in his decision to grant a stay in City of Riverside: "[T]he statute authorizes only the award of 'reasonable' attorney's fees, reflecting Congress's intent that such fees be 'adequate to attract competent counsel' yet not so large as to 'produce windfalls to attorneys.' S. Rep. No. 94-1011, p. 6 (1976), 1976 U.S. Code Cong. & Admin. News 5908, 5913...I think the award of attorney's fees in this case, representing more than seven times the amount of the monetary judgment obtained, is so

on Deafness, 813 F.2d at 222, considered in its determination of attorney's fees that "[t]he remedy achieved was...considerably less than the open captioning that plaintiffs sought." That fact, in tandem with plaintiffs' limited success on their claims, determined that the plaintiffs in that case were entitled to a mere forty percent of the total lodestar. This court similarly sees fit to consider, in reaching its award of attorney's fees, the wide discrepancy between the sum prayed for originally and that obtained in settlement.

As a result of our consideration of the factors considered above and the fact that in the court's view there was a substantial doubt as to whether the settling defendants intended to deny the plaintiff of his civil rights (in our view the evidence more clearly displayed a case of genuine misunderstanding), Eiden is hereby awarded a fee of $7,500.00.

Sanctions

As stated in Rule 11, the signature of an attorney constitutes a declaration that "to the best of his knowledge, information, and belief formed after reasonable inquiry [the pleading] is well grounded in fact and is warranted by existing law..." Fed. R. Civ. P. 11. If the court finds there is a violation of the rule, the court is free to impose appropriate sanctions. Id. The court need not find subjective bad faith on the part of the attorney to impose sanctions. Rather, the standard is one of "reasonableness under the circumstances." Zaldivar v. City of Los Angeles, 780 F.2d 823, 829 (9th Cir. 1986).

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disproportionately large that it could hardly be described as 'reasonable.'" Id. at 7.

The rule is intended to prevent frivolous claims, or those "interposed for an improper purpose." As determined in Zaldivar:

> A good faith belief in the merit of a legal argument is an objective condition which a 'reasonable inquiry.' Such inquiry is that amount of examination into the facts and legal research which is reasonable under the circumstances of the case. Of course, the conclusion drawn from the research undertaken must itself be defensible. Extended research alone will not save a claim that is without legal or factual merit from the penalty of sanctions.

Id. at 831.

Defendant County of Los Angeles argues persuasively that the plaintiff's actions against the County of Los Angeles and Sheriff Block were frivolous. When the County filed for summary judgment, the plaintiff failed to file any written opposition to the motion. Finally, at the hearing of the motion, defendant's counsel admitted that there was no evidentiary basis for imposing liability against the County of Los Angeles.[13]

The court cannot permit random, or hunch-inspired, claims against a municipality to go unpunished. While social policy dictates that a lower evidentiary standard may be permissible in civil rights claims against a municipality, allowing Eiden to escape without Rule 11 sanctions would

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[13] As the policy of respondeat superior does not apply here, Sherman Block similarly appears to have been a frivolously named defendant.

be to condone claims against a city where no part of the discovery investigation involved the policy standard required by Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978). That Eiden neglected to make a good faith effort to conduct an investigation of the city's policy (re, the Monell standard) once discovery had begun is indeed reason enough to sanction him. The existing standard with regard to Rule 11 is "well-grounded fact."

Further, counsel's concessions in response to the court's inquiry shortly before the start of the trial and during the trial itself revealed that the naming of officers Brusby and Payne was without factual foundation (see Paragraphs 4 and 5 of the Findings of Fact). In Unioil, Inc. v. E. F. Hutton & Co., Inc., 809 F.2d 548, 557 (9th Cir. 1986), the Court said that "an attorney violates rule 11 whenever he signs a pleading, motion or other paper without having conducted a reasonable inquiry into whether his paper is frivolous, legally unreasonable, or without factual foundation." It is this Court's firm view, that counsel's conduct is fully deserving of the sanction imposed.

In determining the appropriate sanction to levy, a district court has broad leeway, and such decision will not be overturned absent a showing of abuse of discretion. Huettig & Schromm, Inc. v. Landscape Contractors Council of Northern California, 790 F.2d 1421, 1427 (9th Cir. 1986). The Ninth Circuit has further added that the amount of the sanction be reasonable and be "quantifiable with some precision and properly itemized in terms of the perceived misconduct and the sanctioning authority." Matter of Yagman, 796 F.2d at 1165. By itemizing or at least noting the basis for the sanctioning, a district court can put the offending party on notice as to his misconduct.

Several Ninth Circuit opinions have suggested that basing sanctions on the amount of attorneys fees expended in opposing the frivolous or improper motion or pleading will not be considered an abuse of discretion.[14] Sanctions may be based on other criteria as well, yet by tying the sanction to the attorneys fees expended, the court is not unnecessarily chilling effective lawyering nor overburdening attorneys with uncalled-for punishment.

Here, the declaration of Deputy County Counsel, Kevin C. Brazile[15], indicates that the County spent approximately 93.3 hours in defending the entire lawsuit. Mr. Brazile further demonstrates that County Counsel generally charges approximately $90.00 for its legal services. In reviewing these hours, this court has determined that of the 93.3 hours, counsel expended approximately 39.1 hours in opposing the complaint as it pertained to the County of Los Angeles and Sheriff Block.

Applying the lodestar approach, the value of the County's attorney's fees is $3,519.00. Furthermore, this court finds that the County's costs, approximately $1,200.00

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[14] In Unioil, 809 F.2d at 559, the Ninth Circuit found that a sanction based on reasonable expenses, including attorneys fees, "plainly comports with rule 11, and we find no abuse of discretion." (Sanction of $294,141.00 not unreasonable in light of great liability threatened by complaint.) In Hewitt v. City of Stanton, 798 F.2d 1230, 1233 (9th Cir. 1986), the court found that $1500.00 based on partial attorneys fees was not an abuse of discretion. In Huettig, the court determined that a sanction of $5,625.00 based on hours worked by counsel in defending motion multiplied by a certain rate per hour did not constitute an abuse of the district court's discretion. See Huettig & Schromm v. Landscape Contractors, 582 F.Supp. 1519 (N.D. Cal. 1984).

[15] The court, over the objection of plaintiff's counsel, granted Mr. Brazile leave to file his declaration after the hearing. See Local Rule 7.3.2.

as stated in Mr. Brazile's declaration, should also be granted as part of this sanction.

In addition to considering Mr. Brazile's declaration as it related to fees and costs, this court, in modifying the lodestar figure, also considered the Kerr factors as generally defined above. In conclusion, this court sanctions Mr. Eiden in the amount of $4,719.00.

IT IS SO ORDERED.

DATED: September 30, 1987

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RUFUS E. CUNNINGHAM,
Plaintiff,

v.

COUNTY OF LOS ANGELES, et al.,
Defendant-Appellee,

and

RICHARD EIDEN,
Real-party-in-interest-Appellant.

No. 87-6596
D.C. No. CV-85-5795-SVW
OPINION

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted
August 1, 1988—Pasadena, California

Filed October 11, 1988

Before: J. Clifford Wallace, Jerome Farris and Charles Wiggins, Circuit Judges.

Opinion by Judge Farris

OPINION

FARRIS, Circuit Judge:

Rufus Cunningham, a peace officer for the California Department of Insurance, brought an action on a claim of false arrest and wrongful search against employees of the Los Angeles County Sheriff's Department and the County. He prevailed in his action, although not on all grounds asserted in the complaint or against all defendants. He appeals: 1) the amount of the award for attorney's fees under 42 U.S.C. § 1988; 2) the imposition of Fed. R. Civ. P. 11 sanctions against his counsel; and 3) the failure to award him his costs as prevailing party.

FACTUAL AND PROCEDURAL OVERVIEW

Cunningham filed suit against the County of Los Angeles; Sheriff Sherman Block; Sheriff Deputies Robert Birdsall, Richard Papp, and Richard Payne; and Sergeants David Brusby and Edgar Price. He alleged that his arrest by the Sheriff's Department was unsupported by probable cause and resulted in a "deprivation of liberty, invasion of his privacy, and violation of his civil rights." He also contended that the Sheriff's Department has a "custom, policy and practice of racial discrimination against Blacks." He claimed compensatory damages of $20,000 and punitive damages of $500,000.

On April 22, 1987, Los Angeles County and Sheriff Block moved for summary judgment on the theory that no policy or custom attributable to the County was the legal cause of Cunningham's constitutional deprivation. Cunningham did not oppose the motion, which was granted. On May 26, 1987 just before trial, the court also dismissed all counts against Sergeant Brusby and Deputy Sheriff Payne.

The trial began on May 26, 1987. Prior to closing arguments or jury instructions, the case settled for $5,000.

Because the settlement labeled Cunningham the prevailing party, he became entitled to seek attorney's fees under 42 U.S.C. § 1988. The trial court ordered a hearing on Cunningham's motion for attorney's fees and issued an order to show cause why the naming of certain defendants in the complaint should not be deemed a violation of Fed. R. Civ. P. 11.

At the hearing, the district court awarded attorney's fees of $7,500 to Cunningham and assessed monetary sanctions against him in the sum of $5,000. Counsel for the County and Sheriff Block later submitted a declaration detailing fees and costs at $4,719, and the court reduced the Rule 11 sanctions to this amount.

Cunningham appealed in a timely fashion. We have jurisdiction pursuant to 28 U.S.C. § 1291.

I. THE ATTORNEY'S FEE AWARD

[1] Section 1988 provides that in federal civil rights actions or proceedings, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988. We review the district court's assessment of attorney's fees for abuse of discretion. *Jordan v. Multnomah County,* 815 F.2d 1258, 1261 (9th Cir. 1987); *Hardin v. White Mountain Apache Tribe,* 779 F.2d 476, 480 (9th Cir. 1985). "The district court's discretion to award attorney's fees under § 1988 has, however, been narrowly construed and is circumscribed by decisions of the Supreme Court and this circuit." *Jordan,* 815 F.2d at 1261 (citations omitted). In order to facilitate our review of its exercise of discretion, the district court should "provide a concise but clear explanation of its reasons for the fee award." *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983).

[2] The legislative history of § 1988 does not explain what constitutes a "reasonable" attorney's fee, but it does endorse the multi-factor guidelines developed by the Fifth Circuit in

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). *See also Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976). The Supreme Court has interpreted this endorsement of a flexible standard by adopting a two-part test to channel the district court's exercise of discretion. Under this "hybrid approach" to the calculation of a reasonable attorney's fee for the prevailing party, courts must first calculate a lodestar amount by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. *Hensley*, 461 U.S. at 433. Next, the court may increase or reduce the presumptively reasonable lodestar fee, *see Quesada v. Thomason*, Slip. Op. No. 87-5919, at 7457 (9th Cir. 6/23/88) (citing *City of Riverside v. Rivera*, 477 U.S. 561 (1986)), with reference to the *Johnson/Kerr* factors that have not been subsumed in the lodestar calculation, *see Wood v. Sunn*, Slip Op. No. 87-2056, at 9136-37 (9th Cir. 7/27/88) (identifying several factors that have been subsumed); *Clark v. City of Los Angeles*, 803 F.2d 987, 990 & n.3 (9th Cir. 1986).

A. *The Lodestar Figure*

[3] The only dispute on appeal with respect to the lodestar calculation concerns the number of hours reasonably expended on the case. The district court, after considering Cunningham's requests of $26,120 for work on the merits and $3,037.50 for work on motions relating to attorney's fees and sanctions, fixed the lodestar figure at $12,000. This amount was based on the hourly rate of $135 claimed for Cunningham's attorney, Richard Eiden, and the hourly rates claimed for Eiden's clerks. The court accepted both of these rates as reasonable. In determining the number of hours to be figured into the lodestar, however, the court reduced the figure claimed by Cunningham because it deemed this number of hours excessive. We review this decision for abuse of discretion.

The starting point of our review of the record must be a "recogni[tion] that deference is to be given to a district court's determination of a reasonable attorney's fee." *Chalmers v. City of Los Angeles,* 796 F.2d 1205, 1213 (9th Cir. 1986), *amended,* 808 F.2d 1373 (9th Cir. 1987). On the one hand, we need "some indication or explanation of how the district court arrived at the amount of fees awarded" because without an adequate explanation, "it is simply not possible for this court to review such an award in a meaningful manner." *Id.* On the other hand, we do not require an elaborately reasoned, calculated, or worded order; a brief explanation of how the court arrived at its figures will do. *See, e.g., Quesada,* Slip Op. at 7458 (although "we would have preferred a more detailed explanation . . . , the district court['s brief comments were] enough to review its decision").

Substantively, both the Supreme Court and our cases have emphasized the discretionary nature of the court's determination of the number of hours *reasonably* expended. One factor that may be used to reduce this number is inadequate documentation. *Hensley,* 461 U.S. at 433. Assuming that the party seeking attorney's fees submits evidence supporting a particular number of hours worked, the court may credit that party with fewer hours if the time claimed is "excessive, redundant, or otherwise unnecessary." *Id.* at 434. Among the factors that may justify a gap between the hours actually spent and the number of hours deemed reasonable are: (1) the overstaffing of a case or a demonstration of exceptional skill and efficiency; and (2) the relative novelty and complexity of the issues raised. *Hensley,* 461 U.S. at 434; *Chalmers,* 796 F.2d at 1212.

[4] We focus first on the requirement that the district court give at least a brief explanation of its reasoning and calculations. In the portion of its order devoted to determining the lodestar amount, the court justified its view that the time spent on the case was unreasonable with reference to Cunningham's level of success. The court did not express any

doubts that the time claimed by Eiden was actually spent.[1] Instead, it analyzed the claims brought against the various defendants and concluded, based in part on the fact that only three of the seven defendants named in the complaint remained at trial, that Cunningham's level of success was not high. The order then reduced the number of hours to reflect the lack of success. In addition, the court stated that the twenty-two hours that Eiden devoted to the Rule 11 sanctions threatened against him by the court do "not reflect a civil rights claim successfully pursued," and should therefore be deemed unreasonable for lodestar calculation purposes. On the basis of these two reductions, the court set the lodestar figure, which encompasses "work on the merits and on the post-settlement motions," at $12,000.

Courts need not attempt to portray the discretionary analyses that leads to their numerical conclusions as elaborate mathematical equations, but they must provide sufficient insight into their exercises of discretion to enable us to discharge our reviewing function. As in *Quesada,* the order before us is hardly a model of clarity, and we would have preferred a more straightforward calculation of the number of hours reasonably spent. Nonetheless, the court's citations and numerical conclusions are helpful, and the explanation of its reasoning gives us a good indication of how the court's discretionary authority was exercised in this case. We conclude that the attorney's fee order satisfies the "concise but clear" explanation requirement of *Hensley* and its progeny.

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[1]The court does assert, in its discussion of the *Johnson/Kerr* factors under the second step of the "hybrid" analysis, that Cunningham failed adequately to document the work of three law clerks. The court nowhere states, however, what portion of the 290 hours claimed for the clerks' work *was* documented. The court merely uses its assertion of inadequate documentation to support a further reduction of the fee award below the lodestar. Because this analysis was insufficiently explained, we decline to transpose it to the lodestar analysis. And because the Supreme Court has held that this factor may only be considered as part of the lodestar calculation, it was improper for the court to rely on this rationale to adjust the lodestar. *See* discussion, *infra.*

A weightier question concerns whether the district court abused its discretion in reducing the lodestar amount for the reasons cited in the court's order. Cunningham contends that there was an abuse of discretion because the reduction in number of hours was based on impermissible factors that were unrelated to whether the time spent on the case was "reasonable." In particular, Cunningham takes exception to the comparison in the court's order of the number of defendants who remained at trial with the number of defendants named in the complaint. In Cunningham's view, this comparison bears no relation either to the success of his lawsuit or to the time and effort that was reasonably spent in preparation of his case. Cunningham claims that his attorney is entitled to collect fees for all of the time claimed because, despite the dismissal of several defendants and his failure to succeed on every theory, the litigation was generally a success from the plaintiff's perspective.

[5] We agree with Cunningham's legal premise that courts may not adopt rigid mathematical formulas tying the lodestar figure to the ratio of defendants remaining at trial to defendants served in the complaint. The Supreme Court has disapproved on more than one occasion of such pretensions to mathematical precision. In *Hensley,* the Court expressed its agreement "with the District Court's rejection of 'a mathematical approach comparing the total number of issues in the case with those actually prevailed upon;' " reasoning that "[s]uch a ratio provides little aid in determining what is a reasonable fee in light of all the relevant factors." 461 U.S. at 435 n.11. In *City of Riverside v. Rivera,* 477 U.S. 561 (1986), the plurality rejected a rule of proportionality that would have limited attorney's fee awards under § 1988 to a proportion of the damages recovered in the underlying suit and endorsed instead a flexible approach to lodestar calculations that takes into account all considerations relevant to the reasonableness of the time spent. *Id.* at 573-80 (opinion of Brennan, J.); *accord id.* at 585 (Powell, J., concurring in the judgment) (rejecting strict rule of proportionality because "[t]he facts and

circumstances of litigation are infinitely variable"); *id.* at 595 (Rehnquist, J., dissenting) ("I agree with the plurality that the importation of the contingent-fee model to govern fee awards under § 1988 is not warranted by the terms and legislative history of the statute"). We agree that a unifactor approach tying the number of hours accepted as reasonable solely to the proportion of defendants ultimately prevailed against would be inconsistent with the statutory mandate that district courts exercise discretion by considering *all* factors relevant to reasonableness.

[6] But insofar as Cunningham argues that this is what the district court did in the case at bar, we do not agree. We recognize that the court considered, among several factors, Cunningham's failure to produce evidence to back up his allegations against four of the seven defendants named in the complaint. But far from an arbitrary slashing of the lodestar amount by the percentage of defendants dismissed, the court analyzed the importance of each defendant to Cunningham's overall case. The court considered not just the number of defendants, but also the claims brought against each one. Each factor was analyzed not for some talismanic significance of its own, but for its ability to shed light on " 'the significance of the overall relief obtained' to all the claims and remedies pursued in the litigation." *Greater Los Angeles Council on Deafness v. Community Television of Southern California,* 813 F.2d 217, 222 (9th Cir. 1987)(citing *Hensley,* 461 U.S. at 435).

[7] This analysis was wholly proper. As we have recognized in the past, the "results obtained" are probative on the issue of the "reasonableness" of a fee award. *See Kerr,* 526 F.2d at 69-70 (eighth factor listed). This factor is among those that "are now subsumed within the initial calculation of the lodestar amount," *Wood v. Sunn,* Slip. Op. at 9136 (citing *Blum v. Stetson,* 465 U.S. at 886, 898-900) (1984)), and may thus be considered in determining whether the hours spent on the

case are reasonable. As we stated in a passage quoted by the district court in its order:

> [T]he mere fact that [plaintiff] was not victorious as to all defendants does not automatically bar an attorney's fees award. . . . However, the amount of attorney's fees they receive should be based on the work performed on the issues in which they were successful.

Sethy v. Alameda County Water Dist., 602 F.2d 894, 897-98 (9th Cir. 1979), *cert. denied*, 444 U.S. 1046 (1980).

The district court's analysis was faithful to that principle. Congress vested trial courts with the discretion to undertake such analyses because they are by their nature inexact. Reasonable people may differ as to what number of hours was *reasonable* to spend on this case. But once we are satisfied that the district court has considered the appropriate factors for the appropriate reasons, our reviewing function is finished. Because we are so satisfied in this case, we hold that it was not an abuse of discretion to set the lodestar figure at $12,000.

B. *The Kerr Factors*

Our affirmance of the lodestar calculation does not end our inquiry. Cunningham also objects to the district court's use of the *Kerr* factors to reduce Eiden's fee award from the lodestar figure of $12,000 to $7,500. According to Cunningham, all of the factors relied upon by the district court to lower the award are subsumed in the initial lodestar determination and are therefore impermissible grounds for further reductions.

We generally review the application of the *Kerr* factors to the facts of individual cases for abuse of discretion. This discretion is circumscribed by the pronouncements of the Supreme Court and this Circuit, *Jordan*, 815 F.2d at 1261, and "any elements of legal analysis and statutory interpreta-

tion which figure in the district court's decisions are reviewed *de novo*." *Hall v. Bolger*, 768 F.2d 1148, 1150 (9th Cir. 1985).

[8] Under the lodestar approach, many of the *Kerr* factors have been held subsumed in the lodestar determination as a matter of law. *Blum*, 465 U.S. at 898-900. These factors may not act as independent bases for adjustments of the lodestar. *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987); *Jordan*, 815 F.2d at 1262 n.6. Those *Kerr* factors that are not subsumed may support adjustments in rare cases, provided the district court states which factors it is relying on and explains its reasoning. *See Pennsylvania v. Delaware Valley Citizens' Council*, 106 S. Ct. 3088, 3098 (1986), *rev'd after rehearing on other grounds*, 107 S. Ct. 3078 (1987) (upward adjustment based on unsubsumed *Kerr* factors is permissible in "certain 'rare' and 'exceptional' cases," provided the adjustment is "supported by both 'specific evidence' on the record and detailed findings by the lower courts"); *Quesada*, Slip Op. at 7458 (recalling, in a case involving a downward reduction, that "[t]he Supreme Court has repeatedly emphasized that the lodestar fee should be presumed reasonable unless some exceptional circumstance justified deviation"). While we will give courts latitude to balance and weigh permissible factors, any reliance on factors that have been held to be subsumed in the lodestar determination will be considered an abuse of the trial court's discretion.

[9] In this case, the district court gave four justifications for the downward adjustment of the lodestar amount: (1) insufficient documentation of dates and activities with regard to the work done by the law clerks; (2) a "mediocre" performance by Eiden; (3) the relatively low settlement figure of $5,000, as compared with Cunningham's request in his complaint for compensatory and punitive damages totaling $520,000; and (4) the court's view that "there was a substantial doubt as to whether the settling defendants intended to deny the plaintiff of [sic] his civil rights."

The precedents make clear that the first two of these reasons are not properly considered under the second step of the "hybrid" analysis. The Supreme Court held in *Hensley* that the first rationale, inadequate documentation, is subsumed in the lodestar determination. 461 U.S. at 433. Quality of representation, the second justification, has also been held subsumed, at least in the absence of specific evidence that the attorney's performance is exceptional or abysmal. *Delaware Valley Citizens' Council,* 106 S. Ct. at 3098-99; *Blum,* 465 U.S. at 899-900; *Jordan,* 815 F.2d at 1262 n.6. Insofar as the district court relied on these factors to reduce the fee award below the lodestar amount, it abused its discretion.

The third factor, a comparison of the damages sought with the settlement figure, raises the question of whether the relief obtained is subsumed in the lodestar determination. The district court sought to distinguish "the question of whether the time was reasonably spent, arriving at a figure by examining in part the claims asserted and whether they were successful," from an examination of "the final award relative only to the 'amount involved.' " The court allowed that the first part of its dichotomy was accounted for in the lodestar calculation, but nonetheless considered a narrower focus on the final damage award a legitimate *Kerr* factor. As support for this dichotomy, the court cited the Supreme Court's decisions in *Blum* and *Hensley.* As authority for reducing the fee award because the damages recovered were much less than those sought, the court cited our decision in *Greater Los Angeles Council on Deafness,* 813 F.2d 217.

The Supreme Court, in its post-*Hensley* pronouncements on § 1988, has put considerable force behind its requirements that district courts treat the lodestar figure as presumptively reasonable and adjust it only in rare or exceptional cases. Whereas in *Hensley,* the Court hinted at a two-part inquiry that first addressed the lodestar and then modified that number "upward or downward" according to the "results obtained," 461 U.S. at 434, more recent cases have held that

"the 'results obtained' generally will be subsumed within other factors used to calculate a reasonable fee," and that this factor "normally should not provide an independent basis for increasing the fee award," *Blum*, 465 U.S. at 900. *See also Delaware Valley Citizens' Council*, 106 S. Ct. at 3098 (reading *Blum* as modifying the *Hensley* analysis by expanding upon *Hensley*'s findings "that many of the *Johnson*[/*Kerr*] factors 'are subsumed within the initial calculation of the lodestar' "). We, too, have acknowledged that the "results obtained" is among the factors that are ordinarily subsumed in the lodestar. *See, e.g., Jordan*, 815 F.2d at 1262 n.6.

[10] Thus, in ordinary cases, a plaintiff's "degree of success" or the "results obtained" should be adequately accounted for in the lodestar. Only in rare or exceptional cases will an attorney's *reasonable* expenditure of time on a case not be commensurate with the fees to which he is entitled. Adjustments to the lodestar based on "results obtained" must be supported by evidence in the record demonstrating why such a deviation from the lodestar is appropriate. *See Blum*, 465 U.S. at 900. In the case at bar, neither the record before us nor the district court's order shows why the downward adjustment "was necessary to provide fair and reasonable compensation." *Id.* at 901. This deviation from the lodestar, therefore, cannot stand.

[11] What the district court did was assess Cunningham and his counsel a double penalty for the modest success of the lawsuit. There is no justification in the case law for bifurcating the "results obtained" test in this fashion. To the contrary, *Blum* held that the district court had abused its discretion by adjusting the lodestar upward for "quality of representation" in the absence of "specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.' " 465 U.S. at 899 (citing *Hensley*, 461 U.S. at 435). Because the "quality of representation," like the results obtained, "generally is reflected in the reasonably

hourly rate," the Court reasoned that the adjustment represented "a clear example of double counting." *Id.* Hence, while allowing for the possibility that deviations from the lodestar may be justified in certain situations, the Court made clear that where a factor is generally considered as part of the lodestar, further adjustments based on that factor will ordinarily amount to impermissible double counting and will rarely be sustained.

Contrary to the district court's assertion, therefore, *Blum* does not stand for the proposition "that a requested attorney's fee may be reduced twice — for unsuccessful claims, and again if the final award reflects only partial success." Nor does *Hensley*, which although it reflected the Court's thinking before it explicitly held that the "results obtained" inquiry is subsumed in the lodestar, allowed for only a single reduction of the fee award to reflect a plaintiff's degree of success. *See* 461 U.S. at 434-36. In ordinary cases, the "results obtained" or "degree of success" inquiry is indivisible and should not be parsed up.

Our decision in *Quesada* sheds further light on why the double penalty in this case must be considered an abuse of the district court's discretion. In *Quesada*, as in the instant case, the district court reduced the lodestar figure because plaintiff settled for much less than he requested in his complaint. We reversed on the ground that "it is inappropriate for a district court to reduce a fee award below the lodestar simply because the damages obtained are small." Slip Op. at 7459. We added that the relief obtained in a case may sometimes justify a fee reduction — for example, "if plaintiffs fail to obtain relief on all claims" or "if hours spent on unsuccessful claims were not needed to pursue successful claims." *Id.* But in *Quesada*, no such showing was made. Similarly, defendants have made no such showing in this case, and the district court did not artic-

ulate any connection between the settlement figure and the fee award that was not accounted for in the lodestar.[2]

Our decision in *Greater Los Angeles Council on Deafness*, upon which the court relied, is not to the contrary. In that case, we held that the district court abused its discretion by failing to consider the "results obtained" and "degree of success" under either the lodestar or the *Kerr/Johnson* steps of its analysis. *See* 813 F.2d at 222. This holding did no more than confirm the Supreme Court's statement in *Hensley* that "courts must 'consider the relationship between the extent of [a plaintiff's] success and the amount of the fee award.' " 461 U.S. at 438, *quoted in Greater Los Angeles Council on Deafness*, 813 F.2d at 222.

By contrast, the instant case does not raise the question of whether a court may totally disregard the "results obtained," but rather, whether it may count this factor twice. We hold that in ordinary cases, such double counting is impermissible. In exceptional cases, such deviations may be proper, but the court must explain why the results of the lawsuit are not adequately factored into the lodestar. Because the district court did not do so, it abused its discretion.

The fourth factor cited by the court in support of the reduction from $12,000 to $7,500 — its doubt that defendants intended to violate plaintiff's civil rights — was also an improper ground on which to base a *Kerr* reduction. We have held as a threshold matter "that a plaintiff cannot be a pre-

[2]The court did refer in its lodestar analysis to the "substantial amount of effort [that] was directed to defendants against whom no recovery was obtained." Even assuming that this statement would have supported a downward adjustment of the lodestar had it been made under the second step of the "hybrid" analysis, it cannot justify the reduction here from $12,000 to $7,500 because it was used to justify the setting of the lodestar at $12,000. Such an interpolation would necessarily entail both mathematical imprecision and an impermissible double penalty for plaintiff's modest level of success.

vailing party where a defendant's action is only gratuitous." *California Ass'n of the Physically Handicapped, Inc. v. Federal Communications Comm'n,* 721 F.2d 667, 672 (9th Cir. 1983), *cert. denied,* 469 U.S. 832 (1984); *see also Greater Los Angeles Council on Deafness,* 813 F.2d at 220. But once it is determined that a plaintiff is a prevailing party, a defendant's legal liability is only relevant insofar as it bears on plaintiff's degree of success. *See id.* at 222-23.

The settlement agreement labels Cunningham the prevailing party in this lawsuit, and the government does not seek to overturn this characterization. We therefore do not address the question of whether the County and Sheriff Block acted gratuitously in agreeing to this label. In any event, if the district court wanted to address this factor, it should have done so as a threshold matter, not to justify its *Kerr* adjustment. Or, if the district court meant this factor as a surrogate for the "results obtained" or "degree of success," it should have considered it under the lodestar calculation. In either case, the court abused its discretion.

[12] Because all of the factors relied on by the court to support the downward adjustment were improper, we reverse the second round of reductions and set the attorney's fee award at the lodestar figure of $12,000.

II. SANCTIONS

The district court assessed sanctions under Rule 11 in the amount of $4,719. The court justified this penalty on the following grounds:

> [T]he plaintiff's actions against the County of Los Angeles and Sheriff Block were frivolous. When the County filed for summary judgment, the plaintiff failed to file any written opposition to the motion. Finally, at the hearing of the motion, defendant's counsel admitted that there was no evidentiary basis

> for imposing liability against the County of Los Angeles.

The court also stated "that the naming of officers Brusby and Payne was without factual foundation."

We review *de novo* the district court's conclusion that the facts constitute a violation of Rule 11. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986). "Rule 11 sanctions shall be assessed if the paper filed in the district court and signed by an attorney . . . is frivolous, legally unreasonable, or without factual foundation, even though the paper was not filed in subjective bad faith." *Id.* at 831. "Rule 11 applies only to the initial signing of a 'pleading, motion, or other paper'. Limiting the application of rule 11 to testing the attorney's conduct at the time a paper is signed is virtually mandated by the plain language of the rule." *Oliveri v. Thompson*, 803 F.2d 1265, 1274 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1373 (1987). Any sanctions for actions later in a proceeding must be based on 28 U.S.C. § 1927, which requires a finding that "counsel has acted 'recklessly or in bad faith.' " *In Re Akros Installations, Inc.*, 834 F.2d 1526, 1532 (9th Cir. 1987) (quoting *United States v. Associated Convalescent Enterprises*, 766 F.2d 1342, 1346 (9th Cir. 1985); *see Roadway Express v. Piper*, 447 U.S. 752, 757 (1980); *Zaldivar*, 780 F.2d at 829-32; *Kamen v. American Telephone & Telegraph Co.*, 791 F.2d 1006, 1010 (2d Cir. 1986). "For a sanction to be validly imposed, the conduct in question must be sanctionable under the authority relied on." *McCabe v. Arave*, 827 F.2d 634, 639 (9th Cir. 1987) (citing *United States v. Stoneberger*, 805 F.2d 1391, 1392 (9th Cir. 1986)).

[13] The district court misconstrued Rule 11 by imposing sanctions for the conduct of the litigation after the signing of the pleadings. Plaintiff's claims were not frivolous at the time they were filed. The fact that some of the claims were later found lacking in evidentiary foundation is irrelevant to the Rule 11 inquiry. Without a finding of recklessness or bad

faith, which the district court has not made, sanctions may not be imposed. *See Stoneberger,* 805 F.2d at 1393 (quoting *Roadway Express,* 447 U.S. at 767) (sanctions under the court's inherent powers, like those under § 1927, require a specific finding of bad faith); *accord McCabe,* 827 F.2d at 640. We reverse the award of sanctions.

III. COSTS

Cunningham argues that the district court erred in refusing to award him his costs. We disagree. Cunningham's failure to comply with the mandatory filing provisions of Central District Local Rule 16.3 barred his recovery of costs.

We award neither party costs or attorney's fees for this appeal.

REVERSED IN PART and AFFIRMED IN PART.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RUFUS E. CUNNINGHAM,
Plaintiff,

v.

COUNTY OF LOS ANGELES, et al.,
Defendant-Appellee,

and

RICHARD EIDEN,
Real-party-in-interest-Appellant.

No. 87-6596
D.C. No. CV-85-5795-SVW
ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted
August 1, 1988—Pasadena, California

Filed October 11, 1988
Amended March 3, 1989

Before: J. Clifford Wallace, Jerome Farris and Charles Wiggins, Circuit Judges.

Opinion by Judge Farris

ORDER

The opinion filed October 11, 1988 is amended as follows. On page 12791 of the slip opinion, delete the second full para-

graph, "We award neither party costs or attorney's fees for this appeal." Substitute:

> Cunningham requests an award of attorneys' fees incurred in prosecuting this appeal. He correctly notes that section 1988 fees are ordinarily available to compensate attorneys for successful litigation of their fee applications, including work on appeal. *See Cabrales v. County of Los Angeles,* Nos. 87-6061, 87-6306, and 87-6371, slip op. 15601 (9th Cir. Dec. 28, 1988); *Greater Los Angeles Council on Deafness v. Community Television of Southern California,* 813 F.2d 217, 223 (9th Cir. 1987). We may deny a request for attorneys' fees on appeal if we find that "special circumstances" exist. *Abu-Sahyun v. Palo Alto Unified School District,* 843 F.2d 1250, 1253 (9th Cir. 1988); *Seattle School District v. Washington,* 633 F.2d 1338, 1348 (9th Cir. 1980), aff'd, 458 U.S. 457 (1982); *Aho v. Clark,* 608 F.2d 365, 367 (9th Cir. 1979); *see Teitelbaum v. Sorenson,* 648 F.2d 1248, 1250 (9th Cir. 1981).
>
> To determine whether special circumstances exist, we examine two factors: (1) whether awarding fees would further the congressional purpose of the Act (42 U.S.C. § 1988), and (2) the balance of equities. *Abu-Sahyun,* 843 F.2d at 1253; *Seattle School District,* 633 F.2d at 1348; *Aho,* 608 F.2d at 367; *see Teitelbaum,* 648 F.2d at 1250. The purpose of the Act is to create an incentive for injured parties to seek judicial review of civil rights claims, *Ackerly Communications, Inc. v. City of Salem,* 752 F.2d 1394, 1396 (9th Cir. 1985), and to encourage voluntary compliance with the law. *Seattle School District,* 633 F.2d at 1348. It appears that Cunningham's claim satisfies the "congressional purpose" prong. Congress sought to encourage civil rights suits, irrespective of the probability of success. *See Teitelbaum,*

648 F.2d at 1249-50 (novelty of action is not a special circumstance). The "prevailing party" requirements serves to screen unfounded actions. Awarding Cunningham fees in this case would encourage civil rights suits.

Cunningham does not fare as well when we consider the balance of equities. Cunningham's attorney tested the boundaries of unethical conduct. Although we have reversed the imposition of Rule 11 sanctions, we noted that Cunningham's attorney made no effort to prove his case against the dismissed defendants. We further noted that section 1927 sanctions might have been appropriate had the trial court made a formal finding of bad faith. It would be unjust to allow an attorney to profit so much from work made necessary largely by his own questionable conduct. If Cunningham had never brought suit against those defendants who were later dismissed, there would have been no occasion to reduce the lodestar in the first place. We therefore hold that based on the balance of equities, special circumstances exist. Cunningham's request for attorneys' fees on appeal is denied.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RUFUS E. CUNNINGHAM, *Plaintiff,* v. COUNTY OF LOS ANGELES, et al., *Defendant-Appellee,* and RICHARD EIDEN, *Real-party-in-interest-Appellant.*	No. 87-6596 D.C. No. CV-85-5795-SVW ORDER AND SECOND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted
August 1, 1988—Pasadena, California

Filed October 11, 1988
Amended March 3, 1989
Second Amended June 20, 1989

Before: J. Clifford Wallace, Jerome Farris and
Charles Wiggins, Circuit Judges.

Opinion by Judge Farris

ORDER

The opinion filed October 11, 1988 and amended March 3, 1989, is further amended as follows.

On page 1682 of the slip opinion, before the paragraph beginning "Cunningham requests an award of attorneys' fees . . .", insert "IV. FEES ON APPEAL."

On page 1683 of the slip opinion, first full paragraph, delete language beginning with the sentence "The purpose of the Act is to create an incentive for injured parties to seek judicial review, . . ." to the end of the opinion. Substitute:

> The balance of the equities in this case strongly disfavor the award of attorneys' fees on appeal. Cunningham's request for fees on appeal is denied.
>
> REVERSED IN PART and AFFIRMED IN PART.

With the above amendment, the panel has voted to deny the petition for rehearing and reject the suggestion for rehearing en banc.

The full court has been advised of the amendment to the opinion and of the suggestion for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The opinion is amended as set forth in this order, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

89-465

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RUFUS E. CUNNINGHAM,
Petitioner,
vs.
COUNTY OF LOS ANGELES, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May attorney fees be denied a prevailing civil rights plaintiff under the Civil Rights Attorney's Fees Award Act of 1976 (amending 42 U.S.C. § 1988) because a court concludes, without any further elaboration, that the "balance of equities" disfavors such award?

2. Does the rule of *Hensley v. Eckerhart*, 461 U.S. 424 (1983), requiring district courts to provide "a concise but clear explanation of its reasons for the fee award," apply to decisions of courts of appeals completely denying fees to successful civil rights plaintiffs?

3. Is the failure to prevail against *all defendants* in an action seeking only *money damages* a "special circumstance" justifying the denial of fees incurred prosecuting successful claims?

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

RUFUS E. CUNNINGHAM,
Petitioner,
vs.
COUNTY OF LOS ANGELES, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent County of Los Angeles believes that Petitioner's Statement of the Case is incomplete, and therefore incorporates herein by reference the Court of Appeals facts section of its opinion set forth at pages A-19 to A-20 of the petition, as Respondent's Statement of Facts.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT'S "BALANCE OF EQUITIES" DOCTRINE DOES NOT CONFLICT WITH ANY DECISION OF THE SUPREME COURT AND THE DOCTRINE IS A CLEAR AND APPROPRIATE STANDARD

The gist of petitioner's argument against the Ninth Circuit's "Balance of Equities" Doctrine is that there are not any special circumstances that would render an award of attorney's fees unjust. However, the proposition that petitioner urges this court to adopt is in conflict with applicable decisions of this court. In *Hensley v. Eckerhart* 461 U.S. 424, 430, 103 S.Ct. 1933, 1937, 76 L.Ed.2d 40 (1983) the court held that a prevailing party should ordinarily recover attorney's fees unless special circumstances render such an award unjust. In accordance with the rule that attorney's fees may be denied where special circumstances render such an award unjust, the Ninth Circuit has adopted the rule that for purposes of awarding attorney's fees on appeal, fees may be denied if special circumstances exist.

The Ninth Circuit's conclusion that petitioner was not entitled to attorney's fees on appeal was correct, because petitioner's attorney tested the boundaries of unethical conduct by filing a meritless and frivolous civil rights action against the County of Los Angeles, Sheriff Sherman Block and Sergeant Brusby. In addition, the Ninth Circuit noted that it was inappropriate to reward petitioner's counsel with an award of attorney's fees for appealing a matter which was caused by his own questionable conduct that may even have subjected

petitioner's counsel to Federal Rule of Civil Procedure, Rule 11, sanctions.

It was proper for the Ninth Circuit to deny petitioner's request for attorney's fees because if fees were granted, other attorney's would be encouraged to file meritless claims and to engage in unethical conduct. Moreover, if the Ninth Circuit had awarded petitioner's counsel's attorney's fees, respondent would be saddled with the burden of paying fees to an attorney who should have been sanctioned for violating Rule 11, of the Federal Rules of Civil Procedure.

II. THERE DOES NOT EXIST A CONFLICT WITHIN THE NINTH CIRCUIT REGARDING WHAT CONSTITUTES "SPECIAL CIRCUMSTANCES."

Petitioner contends that there exists a conflict between *Borunda v Richmond* 885 F.2d 1384, 1392 (9th Cir. 1989), and the instant case because *Borunda v. Richmond, supra*, allegedly stands for the proposition that on appeal, a prevailing party is entitled to attorney's fees unless counsel failed to adequately brief the issue. A review of *Borunda v. Richmond, supra*, reveals that the case does not stand for the proposition which petitioner asserts. To the contrary, in *Borunda v. Richmond, supra*, the Ninth Circuit once again adopted the rule that a prevailing party may be denied an award of attorney's fees when special circumstances render such an award unjust. Furthermore, In *Borunda v. Richmond, supra*, the Ninth Circuit did not rule that failure to brief the issue was the only circumstance that would render an award of attorney's fees unjust.

The decision of *Borunda v. Richmond, supra*, is entirely consistent with the present case because in *Borunda v. Richmond, supra*, the Ninth Circuit merely ruled that based on the facts presented, there were no special circumstances which warranted a denial of attorney's fees. In comparison, in the case at bar, the Ninth Circuit did find that based on the facts before it, there did exist special circumstances that rendered an award of attorney's fees unjust.

III. THE NINTH CIRCUIT DID PROVIDE A CONCISE AND CLEAR EXPLANATION OF THE BASIS FOR DENYING PETITIONER ATTORNEY'S FEES ON APPEAL

Petitioner argues that in the published decision of *Cunningham v. County of Los Angeles* 879 F.2d 473 (9th Cir. 1989), the Ninth Circuit failed to articulate the reasons for denying petitioner attorney's fees for appellate proceedings. A review of the Ninth Circuit's published opinion shows that the reason for denying petitioner attorney's fees is that the balance of equities weighed strongly against an award of attorney's fees on appeal. The reasons why the balance of equities weighed against making an award of attorney's fees was set forth by the Ninth Circuit in an unpublished order filed on March 3, 1989. (See petitioner's writ at A-35 to A-37) According to the order, attorney's fees were denied because it would have been unjust to reward petitioner's counsel for engaging in unethical conduct, which consisted of filing a meritless action against the County of Los Angeles, Sheriff Sherman Block, and Sergeant Brusby.

By conveniently ignoring the Ninth Circuit's unpublished order, petitioner has tried to mislead the court and he has chosen to disregarded the Ninth Circuit's reasons for denying him attorney's fees on appeal.

IV. A DISTRICT COURT MAY REDUCE THE LODESTAR AMOUNT TO MATCH THE LIMITED5 DEGREE OF PETITIONER'S SUCCESS

The final reason that petitioner has offered to this court to grant his petition is that his failure to prevail against certain defendants does not affect the degree of success he obtained. In *Hensley v. Eckerhart, id.*, at 438-489, the court held that when calculating an attorney's fee award, the district court must consider the relationship between the amount of the fee awarded and the results obtained, and then reduce the attorney's fees request where the relief obtained is limited in comparison to the scope of the litigation as a whole.

In the present matter, the district court's decision to reduce the Lodestar to reflect the limited degree of success obtained by petitioner is consistent with the principles set forth in *Hensley v. Eckerhart, supra.* Petitioner failed to prevail against the municipality and the municipality's policymaker (*i.e.*, Sheriff Sherman Block). The unsuccessful claims against the County of Los Angeles and Sheriff Block did determine the results obtained because those claims were based on legal theories that were different from the legal theory in which the settlement was based.

Since petitioner failed to prevail on separate legal theories against different defendants, the result obtained by petitioner, which was a modest settlement of his only

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No. 89-465

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

RUFUS E. CUNNINGHAM, *Petitioner*,

vs.

COUNTY OF LOS ANGELES, et al., *Respondents*,

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF BY POLICE MISCONDUCT LAWYERS REFERRAL SERVICE AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Police Misconduct Lawyers Referral Service (PMLRS), respectfully moves the Court for leave to file the following brief *amicus curiae* in support of the petition for a writ of certiorari filed by Rufus E. Cunningham. The consent of counsel for petitioner has been obtained, but counsel for respondents refuses to consent to the filing of this brief.

INTEREST OF *AMICUS CURIAE*

PMLRS is certified by the State Bar of California and has operated as a non-profit agency since 1982 under the auspices of Community Services Unlimited, Inc. Headquartered in Los Angeles, PMLRS provides consultation and assistance to victims of police misconduct throughout Southern California and, when appropriate, it refers victims to private attorneys for representation in civil lawsuits alleging police misconduct.

The PMLRS panel consists of approximately 75 competent attorneys experienced in police misconduct litigation.[1] PMLRS holds regular workshops and seminars on various aspects of civil rights litigation to keep its panel attorneys abreast of recent developments in trial tactics and the law. In addition, PMLRS actively seeks to recruit new attorneys for its panel to expand its capacity for representing police abuse victims and to increase the choices available for its clients.

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[1]Both Mr. Cunningham's trial counsel, Richard Eiden, and his appellate counsel, Robert Mann, are active members of PMLRS.

PMLRS often refers relatively small civil rights cases to its panel attorneys. Police misconduct victims with serious injuries generally obtain counsel from the regular plaintiff's personal injury bar. Victims with less serious injuries have difficulty obtaining counsel at all. Without PMLRS, many of these victims would not otherwise obtain legal representation for their cases. Most are members of poor and minority communities, the segments of the population which bears the brunt of police abuse.

The interest of the *amicus* is to insure that attorneys who handle relatively small civil rights suits are not penalized for taking on such cases, but rather, that they too are reasonably and fairly compensated for their time and effort when they prevail.

Small cases are important because they are more prevalent. There are many more false arrests than wrongful killings. If the overwhelming majority of fourth amendment violations are not, for practical purposes, actionable, then the right to be free from unreasonable search and seizure is greatly diminished. Accordingly, following the Supreme Court's decision in *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975), Congress enacted the Attorneys' Fees Act of 1976, 42 U.S.C. § 1988, to encourage civil rights litigation by insuring that attorneys who successfully vindicate fundamental rights receive a reasonable fee based on the hours worked, the results obtained and the prevailing rates in the community.[2] To effect Congressional policy

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[2] "Costs are a crucial factor in all forms of legal proceedings. A legal right worth X (in money or otherwise) is not in fact a right if it costs 2X to exercise it." T. Sowell, *Knowledge & Decisions* 236 (1980).

without causing an undue proliferation of attorney's fees litigation, this Court, in decisions such as *Texas State Teachers Association v. Garland Independent School District*, 109 S. Ct. 1486 (1989), *Blanchard v. Bergeron*, 109 S. Ct. 939 (1989), *City of Riverside v. Rivera*, 477 U.S. 561 (1986), and *Hensley v. Eckerhart*, 461 U.S. 424 (1983), has established that (1) prevailing civil rights plaintiffs are entitled to fee awards absent some well defined "special circumstance," and (2) the sums awarded should compensate the attorneys at prevailing market rates for time reasonably expended litigating the claim.

NECESSITY FOR *AMICUS CURIAE* BRIEF

Contrary to the mandate of Congress and resulting Supreme Court precedent, the Ninth Circuit Court of Appeals' decision in *Cunningham v. County of Los Angeles (Eiden)*, 879 F.2d 481 (9th Cir. 1989) (second amended opinion), frowns on attorneys who bring civil rights violations in federal court that involve small damages coupled with a violation of a fundamental constitutional right. It does so by punishing plaintiff's successful trial counsel by depriving him of reasonable attorney's fees because four of the seven defendants, although properly named in the suit, were dismissed before plaintiff prevailed. *Id.* at 484-89. Even more egregious, the Ninth Circuit denied plaintiff attorney's fees for his successful appeal solely on the basis of some

unexplained "balance of the equities," labelling it a "special circumstance." *Id.* at 490-91.[3] PMLRS appeared as *amicus* in the Ninth Circuit proceedings and is familiar with the issues of this case.

The *Cunningham* decision not only conflicts with the decisions of this Court, it is an aberration within the Ninth Circuit as well. For example, in a recent decision, *Borunda v. Richmond*, No. 87-2364 (9th Cir. Sept. 12, 1989), the Ninth Circuit stated that "'The presumption in favor of an award of fees to prevailing plaintiffs in private attorney general lawsuits is, in fact, so strong that a denial of fees on the basis of "special circumstances" is extremely rare.'" (quoting 1 M. Derfner & A. Wolf, *Court Awarded Attorney Fees* para. 10.02[3], at 10-12 (1988)).

Conflicting authority and wide open formulations such as the "balance of equities" are invitations to capricious decisions and intensive litigation over the entitlement to and amount of fee awards. Prevailing plaintiffs should be entitled to certain and simple fee awards based on reasonable lodestar determinations. On

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[3]Trial counsel's supposed error of asserting colorable claims against parties who were subsequently dismissed from the case -- an act which in fact comports with the dictates of this Court as well as the custom and practice of civil rights lawyers in the greater Los Angeles area -- was apparently the basis of the Ninth Circuit's denial of fees on appeal. In its Order and Amended Opinion of March 3, 1989, the Ninth Circuit panel explicitly denied plaintiff's appellate counsel fees because of trial counsel's purported transgression. Petition for Certiorari at A-36 to A-37. The second amended opinion is strangely silent on the point, however. 879 F.2d at 490-91.

this basis PMLRS strongly urges the Court to issue the writ of certiorari and reverse *Cunningham*.

Dated: October 13, 1989

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SUMMARY OF ARGUMENT

The *Cunningham* decision affirmed the trial court's setting plaintiff's trial counsel fees far below the true lodestar amount, and then denied fees altogether to plaintiff's successful appellate counsel. It did so because plaintiff did not prevail against all the parties named in the initial complaint. Such an arbitrary reduction of fees in the trial court and a capricious denial of fees on appeal undermines the Congressional mandate implicit in 42 U.S.C. § 1988 by denying police misconduct lawyers at the trial and appellate levels reasonable fees *even where they prevail.*

Since Congress enacted § 1988, this Court has established through a series of decisions that plaintiffs in civil rights cases are ordinarily entitled to a reasonable fee when they prevail. The clear tendency of precedent in this area is to insure certainty and simplicity in the fee award procedure while protecting litigants from arbitrary and capricious fee determinations. The Ninth Circuit's decision in *Cunningham* departs from such authority and threatens to multiply the volume and complexity of attorneys' fee litigation by interjecting vague formulations about "the balance of equities" into attorneys' fee jurisprudence.

Cunningham conflicts with *Blanchard v. Bergeron*, 109 S. Ct. 939 (1989), and *Texas State Teachers Association v. Garland Independent School District*, 109 S. Ct. 1486 (1989). Certiorari should be granted and the decision of the Ninth Circuit reversed.

ARGUMENT

I. FACTS

Rufus Cunningham brought a civil rights action against seven defendants -- six police officers and their employer, the County of Los Angeles -- alleging that he was arrested without probable cause. After prevailing against three defendants, his trial counsel, Richard Eiden, sought attorney's fees and submitted a lodestar figure of approximately $28,000.

The District Court did not determine the hourly rates to be unreasonable or the number of hours claimed to exceed those actually spent. 879 F.2d at 484-85. Nevertheless, the District Court fixed the lodestar to $12,000, 3/7th of the amount sought. Then the District Court reduced the award to $7,500, and assessed plaintiff's counsel with Rule 11 sanctions of approximately $5,000, leaving a net fee award of $2,500. Each decision was based on the fact that four of the seven defendants named by plaintiff in his initial complaint were dismissed before trial. Plaintiff appealed.

In arguing against the loadstar amount set by the trial court, plaintiff contended that *Hensley v. Eckerhart*, 461 U.S. 424, 435 n.11 (1983), precluded such an arbitrary mathematical formula. The Ninth Circuit agreed; yet it upheld the district court's determination of the lodestar as three-sevenths of the number of hours expended times a reasonable hourly rate. *Id.* at 485-86.

The Ninth Circuit then reversed the district court's reduction of the fee beneath the lodestar and vacated the Rule 11 sanctions, thus establishing plaintiff as the

prevailing party on appeal. However, while recognizing that "fees are ordinarily available to compensate attorneys for successful litigation of their fee applications, including work on appeal," *id.* at 490, the panel declined to award any fees or costs on appeal, stating

> The balance of equities in this case strongly disfavor the award of attorneys' fees on appeal. Cunningham's request for attorneys' fees on appeal is denied.

Id. at 491.

II. THE NINTH CIRCUIT DECISION IN THIS CASE CONFLICTS WITH *BLANCHARD V. BERGERON.*

In *Blanchard v. Bergeron* 109 S. Ct. 939 (1989), Mr. Blanchard recovered a total of $10,000 for his civil rights claim and sought attorney fees and costs totaling more than $40,000. Rejecting a defense contention that the fee award should be governed by principles applicable to tort contingency fee contracts, this Court unanimously determined that § 1988 attorney fees could not be capped at a percentage of the damages.

> "[W]e reject the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms."

109 S.Ct. at 945 (quoting *City of Riverside v. Rivera*, 477

U.S. 561, 574 (1986)).

In the case at bar, the net fees and costs awarded Cunningham by the district court, $2,500, was fifty percent of the $5,000 damage settlement. In setting the fees and costs at this amount, the district court said "Justice Rehnquist thinks that a comparison between the total award obtained and the attorney's fees requested should also be relevant in determining an attorney's fee award." Petition for Certiorari at A-12. The district court also said "The Ninth Circuit approved, in *Greater Los Angeles Council on Deafness*, of a direct comparison between the award sought and that obtained as a factor in determining the attorney's fee award." Petition for Certiorari at A-12 to A-13.[4]

This Court in *Blanchard*, however, did not "accept[] the contention that fee awards in § 1983 damages cases should be modeled upon the contingent fee arrangements used in personal injury litigation." Indeed, "If a contingent fee agreement were to govern as a strict limitation on the award of attorney's fees, an undesirable emphasis might be placed on the importance of the recovery of damages in civil rights litigation." 109 S. Ct. at 945.

Here, both the district court and the Ninth Circuit have substituted number of defendants against whom plaintiff ultimately prevails for the amount of damages

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[4] Neither the Ninth Circuit nor the district court mentioned that plaintiff offered to accept significantly *less* money before trial than was awarded after trial--or that the defendants' highest pre-trial offer was $1,500, which was to include damages, costs (which were alone $1,447.80), and attorney's fees.

obtained in setting a fee award. The position is even less defensible than that rejected by the *Blanchard* court. Moreover, it threatens to place civil rights attorneys in an intolerable ethical conflict of interest.

Counsel actively representing plaintiffs in police misconduct cases soon learn that prudence and caution mandate naming defendants against whom ultimate success is not guaranteed along with those public officials more directly involved in the constitutional violation. In California, civil rights plaintiffs face a brief one-year statute of limitations for civil rights actions compounded by Fed. R. Civ. P. 4(j)'s requirement of service of process within 120 days. Failure to name a party who ultimately turns out to have been responsible may lead to the loss of an otherwise meritorious claim.

If *Cunningham* stands, police misconduct lawyers will be hoisted on the horns of a perpetual and unjust dilemma. Should they jeopardize their clients' cases and expose themselves to legal malpractice claims by naming only parties against whom they are relatively sure to prevail? Or should they risk losing the majority of their fees at trial and then all their fees on appeal (even where they prevail) by cautiously naming all defendants against whom they may assert a colorable claim?

This Court has already addressed the matter. In *City of Riverside v. Rivera*, 477 U.S. 561 (1986), the trial court dismissed plaintiffs' claims against twenty-seven of thirty-two defendants named in a police misconduct case. Nevertheless, an attorney's fee award of almost $250,000 was affirmed. The Court quoted with approval the trial court's comment to plaintiffs' counsel that "it would, in my opinion, have been wrong for you not to join all

those officers since you yourself did not know precisely who were the officers that were responsible." *Id.* at 570-71.

Measured by *City of Riverside*, plaintiff's claims here against the four dismissed defendants were not frivolous, they were prudent. Two of those defendants were involved in plaintiff's wrongful incarceration and the other two employed the offending deputies. After pretrial discovery and motions clarified the proper parties, plaintiff's claim for compensatory damages remained unchanged; he had the same injuries as before. Plaintiff obtained a settlement which compensated him for those injuries. Whether there were three or seven defendants in the case at that stage made no difference. Why, then, should that fact reduce the amount of fees awarded?

It would seem that the courts should encourage litigants to drop those claims which the litigant believes to be unnecessary to the ultimate relief obtained. *Cunningham* sends the opposite message. Should every litigant pursue every claim to the bitter end, even when, after reflection and discovery, it appears that the prosecution of the claim will result in an undue consumption of time? Of course not.

In sum, police misconduct lawyers must be able to look to existing Supreme Court and Ninth Circuit precedent for guidance. When they follow those strictures and they prevail, they should receive a reasonable fee. Here this simple principle has been abandoned.

III. THE NINTH CIRCUIT DECISION CONFLICTS WITH *TEXAS STATE TEACHERS ASSOCIATION V. GARLAND INDEPENDENT SCHOOL DISTRICT.*

In the within matter, the trial court reduced the lodestar to less than half the product of the number of hours expended times a reasonable hourly rate solely because plaintiff prevailed against three of the seven defendants initially sued, even though plaintiff ultimately recovered all the relief to which he was entitled -- money damages. The Ninth Circuit affirmed, stating that

> far from an arbitrary slashing of the lodestar amount by the percentage of defendants dismissed, the court analyzed the importance of each defendant to Cunningham's overall case. The court considered not just the number of defendants, but also the claims brought against each one. Each factor was analyzed not for some talismanic significance of its own, but for its ability to shed light on "'the significance of the overall relief obtained' to all the claims and remedies pursued in the litigation." *Greater Los Angeles Council on Deafness v. Community Television of Southern California*, 813 F.2d 217, 222 (9th Cir 1987) (citing *Hensley*, 461 U.S. at 435).

879 F.2d at 486. This "significance" standard is a variant of the "importance" test already rejected by the Court.

Addressing a highly analogous decision in *Texas State Teachers Association* this Court stated,

> By focusing on the *subjective importance of an issue to the litigants*, it asks a question which is almost impossible to answer. . . . This question, the answer to which appears to depend largely on the mental state of the parties, is wholly irrelevant to the purposes behind the fee shifting provisions, and promises to mire district courts entertaining fee applications in a inquiry which one commentator has described as "excruciating." See M. Schwartz & J. Kirklin, Section 1988 Litigation: Claims, Defenses, and Fees § 156.11, p. 348 (1986). Creating such an unstable threshold to fee eligibility is sure to provoke prolonged litigation, thus deterring settlement of fee disputes and ensuring that the fee application will spawn a second litigation of significant dimension.

109 S. Ct. at 1492-93 (emphasis added).

The facts of *Cunningham* illustrate the difficulties in applying the "importance" standard rejected by *Texas State Teachers Association*. The Ninth Circuit opinion upholds the district court's setting the lodestar at less than one-half the number of hours expended times a reasonable hourly rate because Mr. Cunningham did not prevail on "important" claims, and then appears to deny him appellate fees on the same ground. But not only is such a subjective approach improper, the district court viewed the dismissed claims as *un*important, indeed "frivolous." 879 F.2d at 490.[5]

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[5] The claims were clearly not frivolous, as the panel opinion recognized. 879 F.2d at 490. They were, however, somewhat (continued...)

The result reached by the district court and the panel might make sense -- at least in reference to setting the lodestar if not in connection with denying fees on appeal -- if Mr. Cunningham's trial counsel had spent substantial time pursuing the unsuccessful claims, thus justifying apportionment pursuant to *Hensley*. However, his counsel did not do so. This is clear from the Ninth Circuit's First Amended Opinion where it says that counsel "made no effort to prove his case against the dismissed defendants," Petition for Certiorari at A-37, and from the second amended decision, where the Ninth Circuit wrote that plaintiff "did not oppose" motions for summary judgment and tried the case only with the three defendants against whom he ultimately prevailed. 479 F.2d at 483. The point is driven home by the fact that the district court imposed sanctions (subsequently vacated on appeal) because it believed that "*no part* of the discovery investigation" involved the dismissed defendants. Petition for Certiorari at A-15 (emphasis added).

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[5](...continued)
unimportant. The principal defendant against whom plaintiff did not prevail was the County of Los Angeles because plaintiff did not attempt to prove a case of unconstitutional policy, practice or custom pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and its progeny. While proving up a *Monell* case in circumstances such as those presented here presents substantial problems of proof, the benefits to the plaintiff are minimal at best because the entity is immune from liability for punitive damages, *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), and, as a matter of California law, must indemnify public officials for liability based on compensatory damages. Cal. Gov't Code § 815.2.

Ironically, the County of Los Angeles ultimately funded the plaintiff's settlement here!

Attorney's fee applications should not engender litigation over slippery issues such as the "importance" or "significance" of various claims to the overall relief obtained. When attorney time actually expended can be apportioned between prevailing and unsuccessful claims pursuant to *Hensley*, that should be done. Here, however, the courts below arbitrarily slashed a legitimate lodestar of $28,000 and then denied fees on appeal armed only with vague formulations of "significance" and "balance of equities." Decisions such as *Cunningham, if* allowed to stand, will inevitably multiply the amount and complexity of post-judgment attorney's fees litigation, as parties battle over the validity, meaning and application of precedent which diffuses the clear standards set by this Court.

Civil rights plaintiffs who prevail should be able to obtain an adequate fee award in the amount of hours reasonably spent times the market rate prevailing in the community without having to negotiate minefields of legal mumbo-jumbo. Punitively low lodestar amounts, such as that upheld by the Ninth Circuit here, as well as the capricious denial of fees on appeal, have a serious chilling effect on the plaintiffs police misconduct bar. In that Congress has meant for such litigation to be *encouraged* rather than *discouraged*, PMLRS strongly urges that the Ninth Circuit's decision in *Cunningham* not be allowed to stand.

CONCLUSION

For the foregoing reasons, PMLRS, as *amicus curiae*, respectfully urges that the Court grant the petition for certiorari and issue the writ to the Ninth Circuit Court of Appeals. Ultimately, this case should be remanded to the trial court to fix an appropriate lodestar based on the hours reasonably expended times a reasonable hourly fee. Finally, plaintiff should be awarded reasonable attorney's fees for the work of his appellate counsel.

Allowing the Ninth Circuit's decision in *Cunningham* to stand would increase the volume and complexity of attorneys' fee litigation, undermine the defense of civil liberties, and controvert the clear Congressional mandate embodied in 42 U.S.C. § 1988.

Dated: October 13, 1989

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No. 89-465

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

RUFUS E. CUNNINGHAM, *Petitioner,*

vs.

COUNTY OF LOS ANGELES, et al., *Respondents,*

PETITIONER'S REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

RUFUS E. CUNNINGHAM, *Petitioner,*

v.

COUNTY OF LOS ANGELES, *et al., Respondents.*

PETITIONER'S REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I.

THE "BALANCE OF EQUITIES" IS NOT A "SPECIAL CIRCUMSTANCE."

Respondent correctly acknowledges that attorney fees must be awarded a prevailing civil rights plaintiff absent special circumstances. But the argument that mere reference to the supposed "balance of equities" satisfies the special circumstances requirement is illogical and unreasonable. A court must always balance equities; there is nothing "special" about it. One could "balance equities" and find public interest organizations should not be awarded fees, or a defendant's good faith is important, or the recovery of a large damage award precluded fees, or a contingency fee arrangement renders the award of fees

unnecessary--all of which are not special circumstances and do not permit the denial of fees.[1] A "balance of equities" test is not sufficiently specific to be of any use. One may as well say, "a court is required to award fees unless it does not want to."

II.

THE ACTION OF THE COURT OF APPEALS MAY NOT BE JUSTIFIED BY ITS WITHDRAWN AMENDED OPINION.

Implicitly recognizing the circularity of its argument, Respondent misstates the record and seeks to defend what the Ninth Circuit has already abandoned.

The Ninth Circuit's refusal to award fees on appeal was not based on a determination in an "unpublished order" that Petitioner's trial counsel had engaged in "unethical conduct" which petitioner is "conveniently ignoring" in an effort to "mislead the court." (Brief in Opposition, page 5.) The "order" to which Respondent refers was a portion of the Circuit's Amended Opinion withdrawn after Petitioner's Second Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc. The March, 1989, Opinion is not "unpublished"; it is found at 869 F.2d 427. Petitioner did not "ignore" the withdrawn portion of the Ninth Circuit's Amended Opinion; he made explicit reference to this untenable, abandoned ground at Petition for Certiorari, page 6, footnote 6 (as did Amicus Curiae at Brief in Support of Petition page 4, footnote 3).

It is Respondent who misstates the record, by

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[1] See Petition for Certiorari pages 7, 8, 9.

representing that Petitioner's claims against the County of Los Angeles, Sheriff Block and Sergeant Brusby were "frivolous," and by claiming that trial counsel engaged in "conduct that may even have subjected [him] to . . . Rule 11 sanctions." (Brief in Opposition, pages 2, 3.) The Ninth Circuit held Petitioner's claims were not frivolous and that Counsel committed no Rule 11 violation. (Opinion below, Appendix pages A-33, A-35.) The Second Circuit has likewise held that naming the public entity and its chief is proper. *Oliveri v. Thompson*, 803 F.2d 1265, 1274 (2d Cir. 1986), *cert. denied sub nom., County of Suffolk v. Graseck*, 480 U.S. 918 (1987). This Court in *City of Riverside v. Rivera*, 477 U.S. 561, 570, 571, recognizes the need to name all potential defendants. Naming these defendants "comports with the dictates of this Court as well as the custom and practice of civil rights lawyers in the greater Los Angeles area . . . ." (Police Misconduct Lawyer Referral Service Motion for Leave to File Amicus Curiae Brief, page 4, footnote 3.)

III.

CUNNINGHAM AND BORUNDA ARE DIAMETRICALLY OPPOSED IN THEIR VIEW OF WHAT CONSTITUTES A "SPECIAL CIRCUMSTANCE."

It is not enough that both *Borunda v. Richmond*, 885 F.2d 1384 (9th Cir. 1989), and *Cunningham* recognize that fees may be denied only if "special circumstances" exist and stop there, as does Respondent. The *Cunningham* court pays lip service and nothing more to this Court's "special circumstances" requirement by allowing denial of fees because of the alleged "balance of equities." *Borunda*, on the other hand, took this Court's long established, oft repeated and carefully articulated requirements seriously.

It recognized that there are practically no circumstances sufficiently special to warrant denial of fees and, implicitly, that an alleged "balance of equities" would not be among them.

Cunningham mouths the words "special circumstances," and then fabricates an exception that swallows up the rule: Fees must be awarded absent "special circumstances," except where the "balance of equities" (no need to explain how) does not require such an award. If *Cunningham* is allowed to stand, this Court's efforts to establish understandable rules capable of being applied cost effectively in an even handed, fair manner will be undermined. Every litigant and many courts are likely to see the "equities" differently. There will be increased and unproductive attorney fee litigation, consuming ever more judicial resources.

IV.

THE DISTRICT COURT DID NOT JUST REDUCE THE FEES TO MATCH PETITIONER'S "LIMITED" SUCCESS.

Petitioner acknowledges that fees may be reduced for "limited" success. Were this what occurred, Petitioner would not be petitioning this Court.

This Court in *Hensley v. Eckerhart*, 461 U.S. 424, 435 n.11 (1983), rejected "a mathematical approach comparing the total number of issues in the case with those actually prevailed upon." The Court stated that "[s]uch a ratio provides little aid in determining what is a reasonable fee in light of all the relevant factors. Nor is it necessarily significant that a prevailing plaintiff did not receive all the relief requested."

Petitioner prevailed against three of seven defendants. It was no coincidence that the district court, refusing to give Petition a breakdown, cut the lodestar to exactly 3/7 of the time expended. *Hensley* expressly disapproved this meat cleaver method. Lower courts should follow the precedents of this Court.

Trial counsel's itemized time records clearly showed approximately ten percent of his time was spent on the four defendants against whom Petitioner did not prevail. A ten percent cut would have been arguably correct; any cut beyond that simply and inappropriately punished Petitioner and his trial counsel.

After trial, Petitioner got more than ten times any pre-trial settlement offer. In the real world of civil rights litigation, where it is difficult to obtain any redress at all for those who are wronged by the "minor" indignity of commonplace unlawful arrests and trips to the station house, this is a victory. Petitioner's success in proving defendants' conduct in violation of the United States Constitution triggered Respondent's obligation to pay attorney fees. In the Attorneys' Fee Act of 1976, Congress recognized that requiring the payment of fees is the only way that such wrongs may be redressed.

The courts below are guided by a different star. They are hostile to the prosecution of civil rights violations and do not want to encourage litigants or attorneys to bring such suits by paying them enough to make it possible.

If judicial economy is a goal, then defendants who needlessly consume scant judicial resources by refusing to

fairly and quickly resolve meritorious federal civil rights claims should pay the costs.

V.

RESPONDENT'S OPPOSITION EXEMPLIFIES WHY THIS COURT SHOULD GRANT CERTIORARI.

Respondent's arguments as to what the Ninth Circuit Opinion means demonstrate its dangers.

Respondent argues that Petitioner's counsel were properly denied fees for work successfully performed to punish them for trial counsel's supposed transgressions.

Clearly, the district court's punitive refusal to award the fee trial counsel earned and the Court of Appeals' punitive refusal to award either fees or costs for the successful work of appellate counsel run totally against established law. Counsel did nothing contrary to the accepted practice of civil rights lawyers, let alone anything frivolous, unethical or improper. The discretion to deny fees to a successful civil rights plaintiff is exceedingly "narrow" and circumstances justifying denial "'extremely rare.'" *New York Gaslight Club, Inc. v. Carey,* 447 U.S. 54, 68 (1980); *Borunda v. Richmond*, 885 F.2d 1384, 1392 (9th Cir. 1989). So also is a court's right to impose punishment--whether it be upon counsel or anyone else--for the supposed transgressions of counsel. *See, e.g., Pavelic & Leflore v. Marvel Entertainment Group,* ___ U.S. ___, (December 5, 1989).

This Court should not authorize the withholding of earned fees for the purpose of punishing a prevailing civil

rights plaintiff for the alleged,[2] undefined[3] transgressions of his or her lawyer. Respondent's argument before this Court claiming that this is what happened here shows how *Cunningham v. County of Los Angeles* will be used in the future.

For these various reasons, the petition for certiorari should be granted.

Respectfully submitted,

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[2] There was, of course, never any notice to either petitioner or his trial or appellate counsel that either the district court or the Court of Appeals was considering reduction or denial of fees for work successfully completed because of trial counsel's supposed "unethical" conduct. For the obvious due process problem which this involves, see *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766-67 (1980).

[3] Since the final *Cunningham* opinion makes no reference to the actual basis for punishing petitioner and his trial and appellate counsel, *Cunningham* may be used for the proposition that such punishment (reducing or denying fees) may be meted out without explanation, notice, or hearing.